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THE
OFFICE AND DUTIES
OF
MASTERS IN CHANCERY
AND PRACTICE IN
THE MASTER'S OFFICE.

WITH AN
APPENDIX OF PRECEDENTS.

BY MURRAY HOFFMAN, Esq.
ONE OF THE MASTERS OF THE COURT OF CHANCERY FOR THE
STATE OF NEW YORK.

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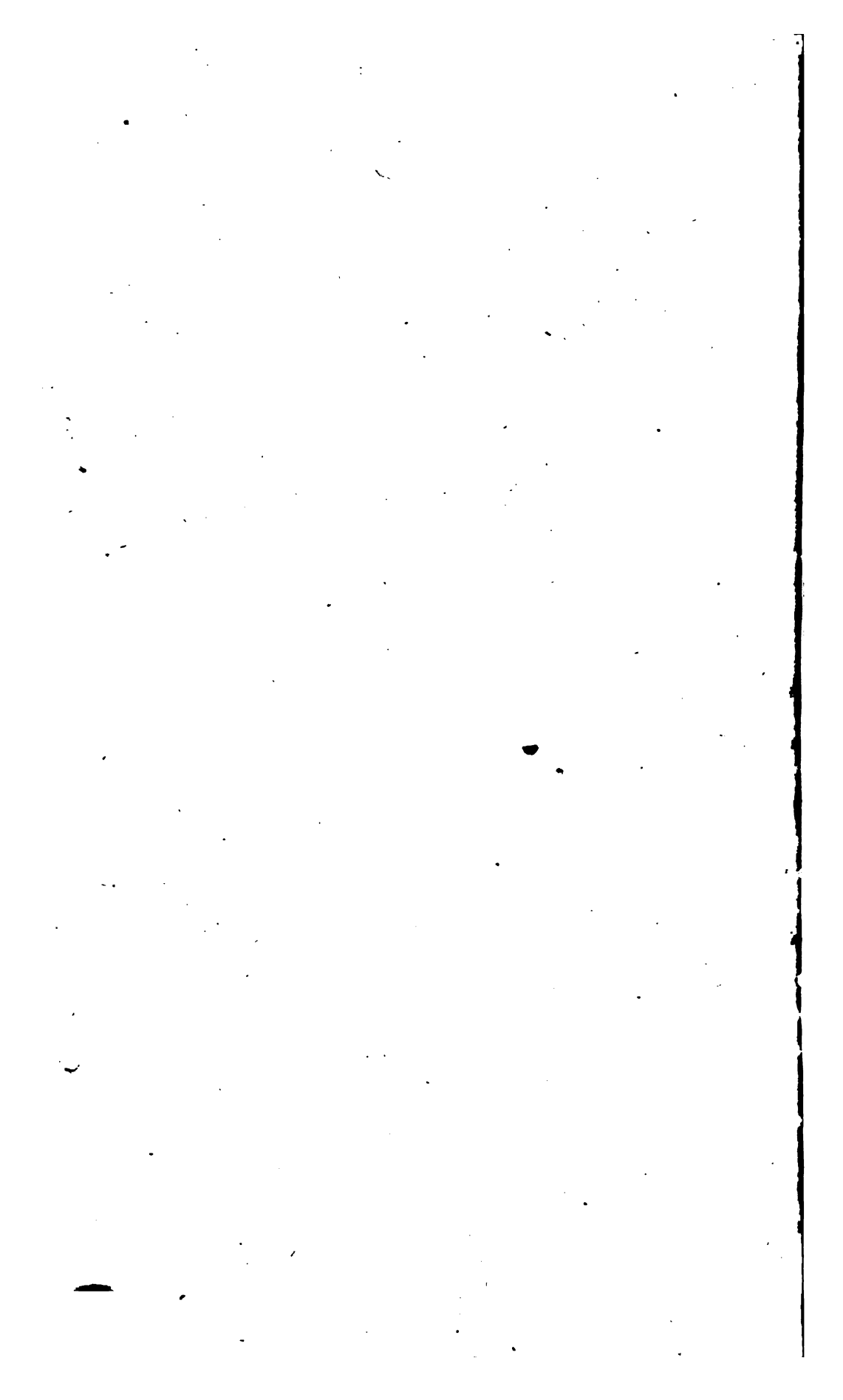
Gift of
James Hillhouse, Esq.
October 22, 1931

Extract of a letter from CHANCELLOR KENT.

THE Manuscript Volumes on the Practice before the Master were not put into my hands until Friday. I have looked them over, and communicated to Mr. B. my high opinion of the accuracy, utility, credit and value of the work. I think it would be purchased by all the Practisers and Masters in Chancery who do any real business, and mean to do it skilfully.

Letter from T. A. EMMET, Esq.

I RETURN the Manuscript work you put in my hands, which I have examined with much pleasure. It seems to me extremely well arranged, and carefully and judiciously executed. I think it will be a very useful work both to Masters, and Solicitors, and I may also say to counsel, for I have certainly gained much information from it. I hope you may derive as much profit from it, as I think the Community will benefit.



INTRODUCTION.

OF THE ORIGIN OF THE COURT OF CHANCERY AND ESTABLISHMENT OF MASTERS.

THE office of Master of the court of Chancery is coeval with the earliest memorials of the court, and it is impossible to satisfy curiosity respecting the institution of the one, without tracing the source of the other. The inquiry into this misty origin may be deemed irrelevant ; but an excuse will be found with all, who, animated by a genuine love for their profession, find their chief gratification in tracing the birth of the laws they assist to enforce, and in regarding the philosophic phenomenon, that at this period of enlarged science and reason, the customs of the barbarians of the dark ages are governing the most enlightened nations of the world. " They are worthy of reprehension who condemn the study of antiquity, (which is ever accompanied with dignity) as an arid curiosity." Preface 10 Reports. •

The discovery of the Pandects of Justinian in 1137 produced a marked effect upon the judicial systems of Europe. Mr. Robertson, (1) attributes to it the first formation of general codes of laws ; the Pandects affording a model for the collection and digest of the customs of the rude nations of Europe. In this he is inaccurate. Long before that discovery several collections had been made in England by the Saxon Monarchs, both before and after the Heptarchy. (2)

It was in another respect that the consequences of this discovery were important. A struggle immediately arose between two rival systems of jurisprudence, one of which was the result of the learning and abilities of distinguished Jurists, acting upon the experience of an ancient civilized com-

(1) Charles 5th, Vol. 1st, N. 25.

(2) Spelman's Glossary "Lex." He mentions several compilations of Ethelbert, of Ina and Offa—of Alfred, "Incluti illius Alfridi Regis Anglicanum Legum conditoris." And the reduction into one body called the common law, of the three systems, viz. of Mercian, Danish, and English law, by Edward the Confessor.

See also a notice of the Dom Bec, or Liber Judicialis of Alfred in Reeves Hist. Eng. Law, Cap. 1. page 25.

munity, and the other had arisen from the customs of barbarous nations; was rude and unformed, and ill adapted to the increasing complexity of society, but yet was full of principles which identified its preservation with public liberty, and protection from arbitrary power.⁽³⁾

(3) The aversion of the northern nations to the civil law may be traced to a very distant period.

"Etiam apud Wisigothos a Cindaswintho Rege sub annum Christi 650. Juris Romani expressissima lege usus prohibetur."

It appears from this dissertation that the Roman law prevailed much in Italy during the dark ages.

Mr. Selden however frequently states, that it was the Theodosian code; and that the Justinian was unknown.

He details the history of the progress of this law among the European nations after the discovery of the Pandects, "*quando velut ex inter mortuis in occidente resurrexerat corpus Justinianum.*"

It appears to have been fully adopted by some, as the supreme law; other nations took it as a guide in cases where former laws were not contradictory, and by some it was wholly rejected.

The latter was its fate in Scotland. "*Tametsi etiam in Scotia usus sit Juris hugus Cæsarei tam forensis quam Academica, is nihilominus haud alius est quam ut Juris extranei ratione in se optimam disputantibus suggerentis, non auctoritatem, qua talis, omnino obtinentis. Nam expressim ibi sanctionibus cavetur Parliamentariis, non alias illic Leges auctoritatem habere præter eas que sunt regni et communes regni.*"

He cites a statute of Scotland. 3 Jac. 1st, Cap. 48.

In England it excited immediate alarm and continued opposition.

An edict of the King forbade its use. "*Rex quidem Stephanus, allatis Legibus Italiæ in Angliam publico edicto, prohibuit ne ab aliquo retinerentur.*"

"When Thomas of Woodstock and others appealed the archbishop of York with others of seducing the King's (Richard 2d.) facile humour to their own desires, advice being asked touching the formality of the appeal, both of common lawyers and civilians, they all agreed it was insufficient in both laws: but answer was given by the baronage that they would adjudge it by Parliamentary authority; neither could they be directed by the civil law, parceque la Royalme d'Angleterre n'estoit devant ces heures, ny a' lentent de nostre dit seigneur Roy et Seigneurs de Parliament unq' ne serra rules ne gouvernes per la ley civil."

One of the articles of impeachment against Cardinal Woolsey, was this—"Quod ipse intendebat finaliter antiquissimas Leges Anglicanas penitus subvertere, et hoc Regnum Angliæ, et ejusdem Regni Populum dictis legibus civilibus et canonibus subjungere."

The celebrated declaration of the Barons in the statute of Merton, "*Quod nolunt leges Angliæ mutare*", was made upon a proposition of a Poictevine favorite of Henry 3d, to legitimize children born before marriage; the rule of the civil law.

Selden's
Dissertatio
ad Fletam
Cap. 5. Sec.
8.
See Cap. 5.
Sect. 5. et
passum.

See Cap. 6.
Sect. 2, 3, 4.

Cap. 6. Sect.
4.

Dissertatio
ad Fletam
Cap. 7. Sec.
6.
Selden's
England's
Epinomis,
Cap. 7. Sec.
5.

Barrington on
the Statutes
Page 38.

Ibid.

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One of the leading doctrines of the civil code and which probably was the chief cause of the opposition it encountered, was the supremacy of the Monarch in legislation. He was considered as the sole author and arbiter of the laws, which were subject to alteration or reversal at his despotic will.(4)

This doctrine was fortunately as hostile to the system of Feudalism, as destructive of the principles of liberty. It could not be endured by those, whose fathers had been accustomed amid the clash of their shields to sanction the decrees of their chiefs; and who themselves, in a regular public body, partook of the dignity and power of legislation. Such a body existed in all the countries of Europe which were influenced by the Feudal system. In England, there is no trace of the monarch's claiming the right of making laws, prior to the Norman conquest. They were passed, and without a question of its authority, by an assembly, of which he was but a member.(5)

(4) "Quod Principi placuit legis habet vigorem cum Lege Regia quæ de ejus imperio lata est, populus ei et in eum omne imperium suum et potestatem concedat. Quodamque ergo Imperator per epistolam constituit, vel cognoscens decrevit, vel edicto præcepit, legem esse constat." The Lex Regia is explained in the note.

Inst. Just.
Lib. 1 Tit. 2.
Sect. 6.

"Imperator solus et conditor et interpres legis existimatur."

Code, l. 11.
22.

See also Domat's Civil Law, Prel. Book, Tit. 1st, sect. 1. 10.

(5) The general Wittenagemotte after the union, was for the whole Kingdom, what the separate Wittenagemottes had been for each distinct one, during the Heptarchy. The following authorities will shew the nature of these bodies.

"Ina King of the West Saxons began his parliament thus.—
"I Ina, by God's gift, king of the West Saxons, with the advice and teaching of Godred my Father, Hedde, my Bishop, and with all my Aldermen, and the eldest wise men of my people, and also a great assembly of God's servants, (the clergy) was careful of the health of our souls, and establishment of our kingdom."

Lambard's
Archeion,
248, 9. 50.
Ed. 1639.

Mr. Lambard then remarks,—“Lest any man should think these estates were called together more for their advice and counsel to be given to the king, than for any authority or interest they had in making the laws: First—The preamble calleth those laws—*Our doomes* or *Judgments*, and the purview saith, ‘We bid or command,’ in the plural number, which also may not be restrained to the king alone for honour's sake, as we now use to speak, for he is there named. ‘I Ina king,’ in the singular number only.”

The author then proceeds to Alfred's laws,—and again answers the objection derived from their style, that they were made with the advice of these wise men as privy counsellors only, not that their assent was necessary. He says, “I will use no other argument than the testimony of Alfred himself drawn out of the

When the Conqueror sought to introduce a more despotic system, he met with so powerful an opposition, that he was compelled to resign the attempt; and although in the course of his reign, partly by force and partly by insidiousness, he effected considerable changes in the legal system of the realm, yet he never ventured to assert the great doctrine of despotism and the civil code, that the Monarch by his sole authority, could establish and change the laws.(6)

This influence of a public body in legislation did much for civil liberty, and well entitled the parliament of England to the appellation given it by Mr. Spelman of *Augustissimum Anglicarum Libertatum et sacra anchora*. There was however an important doctrine of the common law which tended to counteract this principle of the government. The king was considered as the head and fountain of the law; and the meaning of this maxim was, that he was the judge of causes and distributor of justice in the last resort; that the institution of all the tribunals, and the right of changing their decisions, was part of his prerogative. In short, that the supremacy and the majesty of judicial power resided solely in him.(7)

Mirroure,
Cap. 1. Sec.
3. Hughes
Trans. Edit.
1768.

Camden's
Brittannia,
fol. 128. b.

same place, (the preamble to his laws) for he saith,—“That the laws of king Ina, were made by a synod of wise men.”

“For the estate of the realme, king Alfred caused the Earles to meet, and ordained for a perpetual usage, that twice in each year or oftener, if need were, should assemble together in London to speak their minds for the guiding of the people of God, how they should keep themselves from offences, should live in quiet, and have right done them by certain usages and sound judgments.

By this estate many ordinances were made by many kings; and it was assented to, that these things following should belong to the king, and to the right of the crown.”

“Majores nostri Anglo Saxones Wittenagemotte id est prudentum conventus Latini ejus et subsequentis ævi scriptores commune concilium, curiam altissimam, &c. vocarunt. Summam autem et sacrosanciam auctoritatem habet in Legibus ferendis, confirmandis, antiquandis, interpretandis, proscriptis, in integrum restituendis, litibus inter privatos difficilioribus decidendis.”

See also a large collection of authorities in preface, 9th reports, and in Petyt on antient right, 10 to 16.

(6) For an account of the innovations of the Conqueror, See Mr. Selden's *Janus Anglorum* Book 2d. Cap. 1. Petyt on antient right 17 to 48. of preface. Sullivan's *Law Lectures* 28, 29. and Millar on English Government.

(7) “Nemo in lite regem appellat, nisi quidem domi Justitiam consequi aut impetrare non poterit.” Leg. Edg. cap. 2. apud Jurisdiction of Chancery vindicated 8. 2 Reports in Ch'y.

The monarch exercised this high judicial authority in his great Court of Justice, or in private. In either case the Chancellor appears at the earliest period to have been his assistant and adviser upon the subjects brought before him. His decision was made upon principles of equity as well as law, and the distinction of Courts administering justice upon these separate principles, was wholly unknown.

At what period the Chancellor was first employed as an officer of the Crown, it is perhaps impossible to ascertain. He appears to have held a station of dignity and importance long before the Conquest. Part of his duties were to prepare and attest the charters and writings of the monarch.(8)

"Rex et non alius debet Judicare si solus ad id sufficere possit, cum ad hoc per virtutem sacram teneatur." Bracton, Cap. 2.

"Nous voulons que nostre Jurisdiction soit sur toutes Juridictions en nostre Roialme, issint que in toutes maneres de felonies, trespas, Contractes, et en toutes maneres d'autres accions personnelles on reales." Britton, Introduction, fol. 2. Edit. 1640.

"The kings used to go from county to county every seven years to enquire of offences and trespasses and of wrongs done to themselves and to the crown and to the common people, and wrongs of their officers and all false judgments, and they used to do right to all persons, by themselves, or by their chief justices." Mirrour, 62. Cap. 2. S. 3.

Speaking of Turketulus Mr. Spelman says:—

"Cancellarium suum eum constituit (Rex Edwardus Senior) ut quecunque negotia temporalia vel spiritualia Regis Judicium, expectabant, illius consilio et decreto, (tam sanctæ fidei, et tam profundi ingenii tenebatur) omnia tractarentur, et tractata, irrefragibilem sententiam sortirentur." Spelman's Gloss. verbo Cancellarius, citing Ingulphus.

"That relief was given in equity in former times appeareth by the law of king Edgar, Cap. 2. and by the laws of Henry I. Graviores placita soli Justitiæ: vel misericordie principis addicuntur." Jurisdiction in Chancery vindicated, 61.

"Cases were adjudged according to equity before the customs of the realm were written and made certain." Mirrour, Cap. 1. Sec. 8.

"Such as then (before Edw. 1.) sought relief by equitie were suitors to the king himself, who being assisted by the Chancellor and Council, did mitigate the severitie of the law, in his own person when it pleased him to be present; and did in absence either refer the same to the Chancellor alone or to him and some other of the council.—So as the Chancellor had not then any court proper to himself, but rather assisted the king, as did then the chief justice, and the rest of the king's council also." Archion, 59.

"As to the third point of inquiry, viz. of the persons who sat and acted in the king's courts, the king himself was properly head of this court." Maddox Hist. of the Exchequer, Cap. 3. Sec. 5. Mr. Maddox (sect. 6.) cites many Rolls of pleas held before the king in person, in the time of Henry 3d.

(8) Hereby it appeareth that the office of Chancellor then was at first to make and seal the instruments that passed from the prince. This I call his original duty, because it cannot be shewn out of Lambard's Archion, 51.

INTRODUCTION.

The kings of the Saxon-times administered justice in the Wittenagemotte, the seat of the Supreme Judicial, as well as Legislative power. William the Conqueror established one general Court in his palace, and composed it of the chief officers of the crown. But the increasing number of causes arising from the greater complication of the affairs of the community, the power of the Barons, which drove suitors to the Crown for justice, and the magnitude of the authority possessed by the chief justicier, at last led to the division of this great body into lesser jurisdictions, which prevail to this day.(9)

Both before and after this division the Chancellor was employed in the formation and sealing of writs and processes, issued for the commencement of suits. The Normans had pushed the principle of the king being the source of all justice, to the length of declaring, that no writs (where the matter was over 40s.) should issue, but of his special grace, and upon arbitrary fines. It was this oppressive doctrine that the maxim of Magna Carta *nulli negabimus, nulli vendemus rectum vel justitiam* was intended to destroy.(10)

any historie (as I think) that ever there was in England any sealings or writings, or mention of the name of Chancellor before the days of Edward the Confessor, who first brought the Seale from Normandie.

Mr. Spelman however traces the office to the time of Edward the Elder.

Spelman's
Glossary, in
Verbo Can-
cellarius.

"Turketulum, Athelstano, Eadmundo, et Edredo, Regibus, nec non eorum patri Edwardo Seniori Cancellarium fuisse indicat Ingulphus, etiam consiliarum primum precipuum, et a secretis familiarissimum. De munere cancellarii haud perspicue constat subistis sæculis; sed in dictandis chartis regis ei non in exarandis operam Navasse palam est, ex Ingulpho."

2d Reports in
Chan. 5.

Jurisdiction
in Chan. Vin-
dicated, 10.

See also jurisdiction in Chancery vindicated.

(9) "These four Courts (Chancery, King's Bench, Common Pleas, and Exchequer) then included in one Court, called Aula Regis, did follow the king's Court; but by the Charter granted by John, and after by king Henry 3d, the common pleas were appointed to be holden in a place certain, and not to follow the king's Court; yet the Chancellor and Judges of the king's bench did long after follow the king's court. But king Edward 1st, being weary of the great power of the Chief Justice of England, did appoint more to be judges in criminal cases. And then the King's Bench began to be a distinct court, and then the Chancery and Exchequer also came to be several courts."

For the organization of the Aula Regis, see Gilbert's History of the common pleas. Introduction.

Madox Exch.
Cap. 3. Sect.
9.

(10) "The Chancellor used likewise to supervise and seal the writs and precepts that issued in proceedings pending in the Cu-

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When the *Aula Regis* was broken up, those courts which were appointed to administer the settled law were of course bound to observe its rules with strictness, and one branch

ria Regis and the Exchequer; and after the division, in the king's other courts of law."

"In tems Le Roy Alfred nestoit nul briefe de grace, eins fuerant tous briefs remdeials, grantables come de det per Vertue de serement." Mirrouir, Cap. 5. Sec. 1.

"King Alfred at the division of the kingdom into shires or counties instituted this Court called the County Court, and established jurisdiction in it,—granting power and authority to the sheriff to hear and determine such matters as should be brought unto him." Apud. preface 9 Rep. See also Hughes Translation, 246.

"Munus igitur Comitum Judiciarum fuit vim et injuriam prohibere latrocinia comperure, pacem regiam, non solum legum tramite sed armis etiam promovere, Jura Regia et vestigalia curare, colligere, fisco inferre. Presidebat autem foro comitatus, non solus, sed adjunctus Episcopo, hic, ut jus divinum, ille ut humanum, diceret." Spelman's Glos. verbo comites.

"From the first Assemblies came Consistories which we now call Courts, whereof the sheriff held one monthly.—And these Courts are called County Courts where the judgment is by the suitors, if there be no writ, and is by warrant of jurisdiction ordinary." Mirrouir, Cap. 1. Sect. 15. Hughes Transl.

"No cause of consequence was determined without the king's writ, for even in the County Courts of the debts which were above forty shillings there issued a *Justicies* to the sheriff to enable him to hold such plea, where the suitors are judges of the law and the fact. So likewise there issued out the writ of right to enable the lord to hold pleas of land within his jurisdiction, for it grew a maxim among the Normans, that no one could hold lands without the king's patent, nor plea above 40s. without the king's writ." Gilbert's History common pleas. Introduction.

"There was sometime a maxim of the law of England, that no man should have a writ of right but by special suit to the king, and for a fine to be made in the chancery for it. But these maxims be changed by the statute of Magna Carta, Cap. 16. where it is thus said. *Nulli negabimus, nulli vendemus rectum vel Justitiam*. And by the words *nulli negabimus*, a man shall have a writ of right of course in the chancery, without suing to the king for it, and by the words *nulli vendemus*, he shall have it without fine." Doctor and Student, Dial. 1. Cap. 8.

"If the Lord Chancellor did not grant out writs, the courts of common pleas, and the Kings Bench would sit still and have nothing to do; and before the statute of Magna Carta he used to deny them, nor did he grant any writs then but upon great fines." Jurisdiction in Chancery, vindicated, 14.

The construction given by St. Germain if correct, seems to have been violated in practice.

The author of the *Mirrouir*, speaking of the clause of Magna Carta, that nothing shall be taken for a writ of inquisition of life and member, but that it should be granted freely and not denied, says—"The defence which is made of the writ *de odio et atia*, that the King nor Chancellor shall take any thing for granting the writ, ought to extend to all remedial writs." Cap. 26.

of sovereign jurisdiction, that of judging by equitable principles continued solely in the king. It appears to have been exercised by him for some time in a council, but the increase of cases, and of the general business of the state, soon rendered this impossible; and the Chancellor became the minister of this dispensing and relieving power.

The selection of the Chancellor for this office probably arose from this, that he had been almost universally taken from the most learned and enlightened class of the community, and as his habits of judging were not restricted by the narrow rules of the common law, but derived from the more enlarged system of the civil code, he was peculiarly qualified to determine cases where equitable principles and general reasoning were to be resorted to for the rules of decision. (11)

Ibid.

"It is abuse that the remedial writs are saleable."

It is also stated in Fleta that the remedial writs are sometimes prepared without fine, and sometimes with; and after citing the passage from Magna Carta, it is added,—*Sed non inhibitur quin fines capiantur pro brevibus possessionum et actionum personalium civilium, et pro celeri Justitia habenda.*"

The account given by Mr. Sullivan appears to be the correct statement of this point.

Law Lectures, Sect. 42

"In the Saxon times almost all suits except between *grandeens*, were expedited in the county courts. I have observed before, that the Conqueror and his successors discouraged these, and encouraged suits in the *Aula Regis*. Still it was a matter of favour where the cause properly belonged to the country jurisdiction. As a matter of favour, it might be denied by the King, or his Chancellor, who was the issuer of the original writs, unless a sum of money was paid, such as they demanded.

This was selling justice. Or if the person to be sued was a favorite of the King or Chancellor, the writ might be denied.

This was denying Justice. This however is not to be understood as prohibiting the moderate and accustomed fees which had been paid to the officer for making the writs out, or to the judge for sealing them, but only those arbitrary sums which had been before taken."

Spelman's Gloss. Tit. Chancery.

(11) *Omnis regni Justitia solius regis est, et a solo ipso (si sufficeret ad tantam molem) administranda. Illud autem cum impossibile sit, in plurimas distributam portiones ministris cogitur delegare, quos limitibus tamen circumscripsit positivæ legis, ne pro arbitrio spatientur. Positiva vero lex in generalibus versatur, ideoque agit in casus particulares, alias intentius alias remissius; ex quo non justitia sed injuria sæpe fieret si hæc undum esset in summo jure; oriuntur indies causæ ardus et difficultates, quæ nulla ejusdem pagina continentur. In his igitur necessario, recurrendum ad regem Justitiæ fontem. Humanæ vero fragilitatis memores, Principes Christianæ curiam suam id est procures et Barones adhibere in consilium. Ingens multitudo exemplorum quibus prisci illi*

Thus then arose the equitable jurisdiction of the court of chancery, and as it was a branch of that arbitrary judicial power which the rising spirit of independence dreaded; as

Reges causas ad pallatium suum allatas, non unius alicujus Judicio, sed communi Procerum consilio definire. Fessi autem tandi rei mole, cogunter Judiciorum lancem delegatis credere. Func erectis se orsum a Palatio tribunalibus singula multis (quamvis ex canone Judicaturis) nullum unico substituerunt Judici. Causas vero exorbitantes quæ nulli constitutorum tribunalium rite competere, ad Palatium ceu oraculum Regni deferenda statuunt; Judicium Principis e consilio procerum expectaturas. Eo pertinet quod Edouardus primus prisci tenax ritus, lege cavit, ut Cancellarium et Regii Tribunalis Judices aulæ suæ continuo famulantes haberet; hos nempe ut quid legitimum esset, pronunciarent, illum vero ut quid æquum et bonum submoneret. Succedentes autem Reges provinciam hanc conclavi procerum a consiliis suis coacti sunt re linquere. Præsertim Cancellario reliquorum Coryphæo cum propter summam viri prudentiam, tum quod a sinu Regis esset, et in rebus gerendis versatissimus."

The following passage is cited by Blackstone from Joannes Saria-buriensis, who died 26 Henry 2d. speaking of the Chancellor.—

*"Hic est qui Leges regni cancellat iniquas,
Et mandata Pii principis æqua facit."*

At what period the Chancery was established as a separate court cannot be settled with precision.

The argument, (which was first used by Mr. Lambard) that the court did not exist as a court of equity, during the Reigns of Edward 1. & 2d. because it is not spoken of as such in Glanville, Britton, Britton, or Fleta, most of whom treat minutely of the courts, appears almost conclusive. Fleta, the latest of these authors, lived in Edward 2 & 3d. Archeion, 60.
See also
4 Inst. 82. 2
Inst. cap. 5.
Sec. 3. Pref.
10 Rep.

It is stated that the origin of this jurisdiction was a statute passed in the 36 Edw. 2. that if any person think himself grieved, contrary to any of the articles therein written, and will come to the chancery, or any for him, he shall presently have there remedy without elsewhere pursuing to have remedy." King v.
Standish,
1 Lev. 242.

But Lord Coke is clear that this should be taken as confined to the issuing of original writs to the party grieved called remedial, grounded on a statute for relief. 4 Inst. 82.

Although the power of the Chancellor was complained of by the parliament in the reign of Richard 2d, and a petition presented to the King by the commons, that neither the Chancellor nor other counsellor might make any order contrary to the law, yet it does not distinctly appear, that the orders complained of were orders in the exercise of an equitable jurisdiction; and in the case during the same reign, cited by Lord Coke, as the first decree in chancery, the Chancellor seems to have been merely a ministerial officer to attest the judgment, and issue the injunction. The petition was to the king, and the award by his council. 4 Inst. 82.
citing Rot.
Parl.
13 Rich. 2d.
See also
2 Inst. Cap.
5. Sec. 3.

However it is probable, that it did begin to exist as a separate court in this reign. Mr. Lambard says, "I do not remember that in our reports of common law, there is any frequent mention of

Archeion, 67.

equity; the doctrine of arbitrary discretion was destroyed, and the court came to be regarded with approbation and pride, as the useful companion of the free common law.

It is impossible to ascertain when the body of twelve Masters was first established in England. It appears that they were employed as the clerks of the Chancellor in the formation and issuing of original writs; and when a separate court of equity was instituted, they were called upon to assist him in the details of this duty also. (13)

Page 436.

This author says, "that the court is termed a dilatory court, where a suit will last longer than a suit of *perpetuanza*, into which the poor suitors, coming like a flock of sheep to a bush for shelter, are there more wett than they were in the open field; and yet the bush will not part without a fleece, and out of which they go with the same note they came in, pitifully complaining."

Fleta, Lib.
2 Cap. 13.

(13) After speaking of the Chancellor it is said in Fleta—"Cui associantur clerici honesti et circumspecti Domino Regi jurati, qui in Legibus et consuetudinibus anglicanis notitiam habeant pleniorum, quorum officium sit supplicationes et querelas conquerentium audire et examinare, et eis super qualitatibus injuriarum ostensarum debitum remedium exhibere per breviam Regis."

Also Prac.
Reg. 279.

They are also called in Fleta Socii et Collaterales, and clerici de prima forma.

Prof. 10 Rep.

Speaking of the writs in the old Register, Lord Coke says—"of these ancient writs I will say, (as Sir Thomas Smith a Secretary of state said) that all the Secretaries in Christendom may learn of them to express much matter in few and significant words."

Barrington on
the statutes
Westm.
Prim. n. w.

"Duck in his treatise De Anth. Jur. Civ. says—that he had a conversation with Noy (a great though not a good Lawyer) with regard to the civil laws having prevailed in England; and that it was agreed that the Register of writs, known to be of the greatest authority in our municipal law, was drawn by men thoroughly versed in the Roman Law. If that collection was made by the Masters in Chancery, it is some confirmation of what Strahan informs us, that the reason of their attendance on the House of Lords, was originally to be consulted upon points of the civil law."

Gloss. Tit.
Cancell.

Speaking of the Chancellor, Mr. Spelman says—"Habet et ordinarios quosdam assessores (sortis admodum inæqualis, sed cancellarios olim et ipsos dictos) numeroque duodecim ut duodenis illis ab Heraclo institutis, et in inferiori imperio usitatis, respondeant; magistros cancellarii nunc appellatos. Assident vero non omnes simul, sed taciti omnes ministerium præcipienti Cancellario exhibenturi."

Page 293.

In *Hargraves Law Tracts* is a treatise written by a Master in Chancery in the time of Sir Thomas Egerton about the year 1600, entitled, "A treatise of the Maisters of the Chauncerie." The following particulars are collected from this work.

They were formerly created by patent from the King, but since the reign of Edward the 4th, have been appointed by the Lord Chancellor.

In the contest between Lord King and Sir Joseph Jekyll, as to the judicial power of the Master of the Rolls, it was contended on the one side, that, that officer had no other au-

"Touchinge the number of Maisters it appeareth plainlie from Henry Coddington's patent that from all antiquitie, it hath been twelve.

Those only were admitted into the number that had bene brought up and instructed in the court from there youth, and that by the advisement and consent of the king's counsaile in Chancery.

Nostri clerici ad robas they are called in 24 Edw. 3. 13 in the yere books, where it is said that the king called unto him his Chancellor, Treasurer, Justices, and Clarkes of robes in the Chauncerie, to know their opinion concerninge a suspicious deed of releas. The reason of which name grew from this that they were robes of the king's gift.

A part of their service is attendinge the higher House of Parliament, whither the comme without Writt as being a part of the same Court."

He states further that they took precedence in the House of Lords of the king's solicitor and attorney, which precedence was lost by the conduct of a Doctor Barkely, a Master in the reign of Queen Elizabeth.

"One reason of ther attendance is, that the Lords may be informed by the Maisters of the Chauncerie (of which the greater number have alwaies been chosen men, skillful in the civill and canon lawes) in laws that they shall make touching foraine matters, howe the same shall accorde with equitie, jus gentium, and the lawes of other nations."

The author reviews the jurisdiction of chancery arising from use or statutes in a variety of cases, maritime, martial, or ecclesiastical, which as he says, "were to be expedited not in cours of common lawe, but in course of civill and canon lawe, and it was necessary to assist the Lord Chancellor with some learned in this lawe."

By statute 5th Geo. 3d, Cap. 28. £200 per annum is to be paid out of the general cash in the bank belonging to suitors of the court, to each of the eleven Masters. They before received a salary of £100, out of the Exchquer, besides robe money paid in place of the robes formerly furnished to them. Pract. Reg. 280.

They have regular charges for services rendered, under a fee bill, settled by Lord Hardwicke. Beames' Orders 372.

Two or three of the Masters sit in term with the Lord Chancellor, and two when he sits out of term. When the great seal is put in commission or a judge sits for the Lord Chancellor two Masters are associated, and it appears that a decree cannot be made without their assent. Pract. Reg. 279.

"Upon hearing of the cause Mr. Baron Atkyns would have dismissed the bill, but Sir Samuel Clarke, Sir Miles Cooke, and Sir William Beversham, the Masters in Chancery, stood up and opposed it, being of opinion, that there ought to be relief and a Merritt v. Eastwicke, 1 Vernon, 265.

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thority than what he received by delegation from the Lord Chancellor, or by special commission from the crown, and that in the early period of the court, he received such delegated authority in common with the other eleven Masters, although more frequently, from being the chief. Whether this position was established or not, it is certain, that the Masters were frequently intrusted by the court with the hearing of causes, sometimes to be finally decided by them, but generally to *end and determine the matter if they could*, if not, to *report to the court.*(14)

When Lord Bacon received the Seals, he checked references of this nature. In his speech to the court on taking his place, he said—"that he had taken a resolution concerning the communicating the authority of the Chancellor too far, and making upon the matter too many Chancellors, by relying too much upon the reports of the masters as concludent. I know the Masters in Chancery are reverend men, and the great mass of business in the court cannot be sped without them, and it is a thing a Chancellor may soon fall into for his own ease to rely too much upon them."(15)

By his 47th order he provided, that, no reference should be made to any of the Masters of the court, or any other commissioner to *hear and determine*, where the cause has gone so far as the examination of witnesses, except in the special cases mentioned."(16)

decree for the trust, and thereupon the court being divided, no order was made."

Shapland v.
Smith, 1 Br.
C. C. 77.

"Upon exceptions to a Master's report against a title, Baron Eyre, sitting for the Lord Chancellor, was in favour of the exceptions. Master Holford concurred and Master Hett was against them.

Baron Eyre seeming doubtful whether it was necessary the opinion of the Masters sitting with the Judge must concur with his, in order to found a decree, the case stood over to be reheard by the Lord Chancellor, who agreed with Master Hett."

See also the remarks upon *Smith v. Turner*, 1 Vernon 274. in *Legal Judicature in Chancery* stated page 177. Also *Cavendish v. Mercer*, Ibid, 175. and Lord Nottingham's opinion, Ibid, 173, 174. and the entry in *Merritt v. Eastwich*, Ibid, 180.

(14) See numerous instances in *Legal Judicature in Chancery* stated page 84, 85, 86. note. They occur principally in the reigns of Edward 6, Elizabeth, and James 1st. Similar examples at an earlier period may be found in *Hargraves Law Tracts* page 307.

(15) *Legal Judicature, &c.* page 91.

(16) *Beames' Orders*, page 23.

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The earliest ordinances for the government of the court now extant, were passed in the reign of Richard 2d, at which time the prevalence of uses, and the invention of the subpoena, enlarged the business, and originated the present forms of the court. These ordinances were amended in the time of Henry 5th, and subsequently.

By the 16th ordinance, one of the twelve ordinary Masters present in court might, even in the absence of the Lord Chancellor, do every thing except giving definitive sentence. (17) Even at the present day, they occasionally exercise a judicial power in the court. There is a standing commission to the Puisne Judges and the Masters, authorizing them, or any three of them, of whom a Judge must be one, to hold the court in case of the absence of the Lord Chancellor, from sickness or other cause. Under this it is usual for a Judge and two Masters to sit. They are equal in the commission, may overrule the Judge, and a decree cannot be made without them. (See end of note 13.)

The public honors, attached in the early days, to the office were proportionate to the importance of its duties. The Masters took precedence of the Serjeants at law, and the King's Solicitor and Attorney General ; which rank it appears they were deprived of in the reign of Elizabeth. At present they rank next to these officers. (18) They attended the House of Lords without writ, as part of the court, and it is supposed principally to assist as to laws relative to foreign matters, for which their skill in the civil and canon law qualified them. At the present day two of the Masters attend the House every day ; and on the trial of a Peer, or of any person impeached by the House of Commons, all of them attend.

As to their appointment, they were anciently created by the King's patent, and it is a singular circumstance, that the tenure of their office was generally during good behaviour, while that of the Judges continued to be during pleasure, until the 13th William 3d.

In the tract called Discourse of the Judicial Authority of the Master of the Rolls, written by Lord Hardwicke, there are three of these patents, stated at length, two of which in

(17) Legal Judicature, page 78.

(18) Report of Commissioners on Courts of Justice, 1816.

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the reign of Henry 4th, run—"habendum et occupandum dictum officium quamdiu bene et fideliter se gesserit in eodem."

At what period the alteration was made is uncertain, but it was done before the time of Elizabeth, as it is said in the treatise of the Maisters of the Chauncerie, "that their offices are in the gift of the Lord Chancellor."

That this power has been well exercised may be concluded as well from the instances of eminent counsel taken from the bar to fill the office, as from the ability which the books exhibit in the reports of the Masters. In the great case of *Scott v. Tyler*, before Lord Thurlow, (2 B. C. C. 431.) two of the counsel employed, Mr. Alexander and Mr. Stratford, were afterwards appointed Masters. Every equity lawyer is acquainted with the legal acquisitions and accuracy of Mr. Cox. The Masters receive in salaries, and allowances from the crown, about £700 sterling per annum, independent of the emoluments of their business.⁽¹⁹⁾ In our own country, the state of South Carolina has adopted the Chancery system. The organization of the court with respect to Masters is the following. In each of the districts into which the state is divided, a commissioner is appointed by the Governor, holding his office during good behaviour, who unites the duties of Master and Register. It appears that in the Charleston district (where the court sat previous to the division of the state) there was but one Master before the year 1813, and an act of the General Assembly was passed that year, reciting the inconvenience, by reason of the increase of the business of the court, and authorizing the appointment of a commissioner to perform all the duties incident to the office of Master. The Judge of the district is directed to apportion the business between them.

The duties of a Master in Chancery are stated at large, in a report of the commissioners on Courts of Justice made to the British House of Commons in the year 1816. It is there observed, "that it would be impossible to specify every head of reference, because they are almost as numerous as the Matters subject to the jurisdiction of the court,—but that the following most frequently occur.—To examine into any alleged impertinence or scandal in a bill or answer, and into the sufficiency of any answer or examination.—To examine as to

(19) Ibid.

the regularity of proceedings in court, and into alleged contempt—To settle interrogatories for examination of parties.—To take the accounts of executors, trustees, and between parties of every description.—To enquire into and decide upon the claims of creditors, legatees and next of kin.—To appoint Receivers and fix their salaries, and examine their accounts.—To sell estates.—To investigate the title and settle the conveyances.—To appoint Guardians of Infants and committees of lunatics; and allow sums for their maintenance.—To enquire whether Infants are trustees, or mortgagees under the statute 7th Ann.

In general there is *no question of law or equity*, or disputed fact, which a Master may not have occasion to decide, or respecting which he may not be called upon to report his opinion to the court."

All the subjects of reference thus enumerated may be brought before the Masters of our State, and in addition, a knowledge of the rules of evidence is requisite, as the examination of witnesses is conducted orally before them. In England they administer written interrogatories, and illegality is corrected when the depositions are before the court.

Under the present constitution of the state, the Masters are appointed by the Governor, with the consent of the senate, and hold the office for three years, unless sooner removed by the senate on the recommendation of the Governor.

By the Judiciary Bill passed the session of 1823, they are authorized to perform all the duties of their office in all matters or causes depending in the courts of the district Judges, in whom equity powers are vested by that act. Laws, 46
Sess.

Upon the manner of preparing the following work, it may be observed, that there is not a single position in it, resting upon a reported case for its authority, which has been stated at second hand from a book of practice. There are of course many points which are to be found in such books alone, and therefore depend upon the evidence of practical men, that such is the rule. It has happened unfortunately in our state (so far as my own experience extends) that the leaders of the bar have neglected or contemned any study of the rules of practice, and have contributed nothing to its precision or improvement. While every volume of English Reports contains notes of cases taken by the most distinguished lawyers, our own Chancellor in his efforts to settle the course of the court, has been very little aided by those best qualified to assist him.

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If they have regarded the subject as beneath their attention, the sentiment is unfortunate and erroneous. Such is not the opinion of the able and deep thinking Lord Eldon, whose consideration has been as deliberate, and his decision as matured upon points of practice, as upon the important doctrines of the court, and who feel strongly what Lord Erskine declares, "the infinite advantage of connecting practice as much as possible with the substance of Justice." Such was not the opinion of the great Lord Bacon, the man most illustrious in English annals for the powers of intellect, whose mind united in the most eminent degree, the comprehensive and the minute, and the solitary destiny of whose fame it is, that no memorable achievement of art or science can be effected, without casting back a portion of its glory upon his name. He deemed it not unworthy his great understanding to collect, revise, and establish a body of orders, which remain to this day the foundation of much of the existing practice, and which are as remarkable for the precision of their language, as the utility of their provisions.

It is of peculiar importance that the ability of the bar should be exercised upon this subject at the present period, when the rules have not been settled to any great extent by decisions, and the court is yet at the outset of its recorded course. The following treatise is an attempt to assist in establishing the practice in one important branch of a Chancery cause. It is an effort to pay the tribute which Lord Coke declares every lawyer owes to his profession. "I wish I was in a condition to make my offering with a costly victim, and a full censer."



THE

OFFICE AND DUTIES

OF MASTERS IN CHANCERY AND PRACTICE IN THE MASTER'S OFFICE.

CHAPTER I.

THE subjects treated of in the following pages are thus distributed.

Several matters of a general nature, and not peculiarly appropriate to any specific reference, are first disposed of.

The practice upon a general reference to state an account (as in the case of Executors) is next stated.

And lastly, the course in a variety of particular references, in which there are some peculiar points of practice, is detailed : The preceding table will shew the subjects, thus arranged.

After stating the course of practice upon each reference, the general rules and principles of the court, by which the Master's judgment is to be guided upon its subject matter, are noticed.

SECTION 1.

SUMMONS.

"THE thirtieth rule of court provides, that when a mat- Rule 30.
ter is referred to a Master to determine and report upon, he shall assign a day and place to hear the parties, not less than four days exclusive, and the party obtaining the reference shall serve the adverse party, at least three days exclusive before the day assigned, with a summons requiring his attendance, at such time and place, and make the proof thereof to the Master; and thereupon, if the party summoned shall not appear to shew cause to the contrary, the Master may proceed ex-

parte; and if the party serving such summons shall not appear at the time and place, or shew cause why he does not, the Master may either proceed *ex-parte*, or the party obtaining the summons, and not appearing shall lose the benefit of the reference, at the election of the other party." For the form of the summons generally used in New York, and also of the English warrant, see Appendix No. 1.

Page 39.

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June term
1821, Mas.

The latter may be found in the *Clerk's Tutor in Chancery*, and in the *Complete Clerk in Court*. It is shorter and more precise; and in the case of *Morris v. Sands*, the chancellor, after examination, granted an order for an attachment founded upon the Master's certificate of the service of such a summons. It may therefore be adopted.

Hind's Prac-
tice, 263 n.
1 Turner's
Practice, 175.
Howard's Eq-
uity, vide
1st. 31.

The time of return of the English warrant may be the next day but one after its date. "An interval of one whole day between the time of service and of attendance is sufficient. Sunday is not reckoned one." So also in the Exchequer in Ireland, there must be twenty four hours between the service of the summons and time of attendance. In both countries however, three warrants must be served before the Master can proceed *ex-parte*.

See post.
page.

The proper construction of our rule seems to be, that one day is exclusive and one inclusive, although several Masters in New York have understood it otherwise. The word "exclusive" refers to the day assigned, and appears to imply that the day of the date is inclusive.

See the Fee
Bill, Beames
Orders, 372.
Ibid. 468.

In England the Master draws the warrant, and the solicitor copies and serves it; here it is prepared by the solicitor and signed by the Master. He should be careful that the underwriting is to the summons when he signs it, as he must frequently certify a default as to the matter of the underwriting. Indeed it is most proper that he should draw and sign it himself. "The service of all warrants is upon the adverse clerk in court, or his agent at his seat in the six clerk's office, by leaving a copy and shewing the original."

Hind. Prac.
263. n.

Rule 58.

Service of a summons must be made upon the solicitor of the party, if one is concerned; but if no solicitor is concerned, the service may be on his clerk in court.

Per Sir S.
Romilly, 17
Ves 387.
Hind's Prac.
95. Fowler's
Exch.
Prac. 1. 211,
212.

If the bill is taken *pro confesso* for want of an appearance, no summons is served. It could not be upon a clerk, because there can be no clerk in court of a party who has not appeared. That officer is constituted by authorizing an appearance to be entered by him, and anciently he performed the duties of a solicitor. The service on a clerk is in cases in which the party enters an appearance in person with the clerk, and not by a

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solicitor; which he has a right to do. *The fifty fifth rule of court does not take away this right; it only restrains a party from prosecuting or defending except by a solicitor, unless special liberty is given, or the party is an officer of the court.*

So in the case of an infant, he cannot defend except by guardian, but he may, and in England usually does, appear in person. Fowl. Exc. Prac. 458,

When a party by special order, or an officer of court, prosecutes or defends in person, the rule provides, that all notices and other papers may be served on the party, or at the office of his clerk in court, at the election of the party serving the same. It would seem from the *fifty eighth rule*, that in such case, the service of a summons must be on his clerk. Rule 55: *rule 16*

For the form of the affidavit of service, see Appendix No. 2.

When the bill has been taken *pro confesso* for want of an answer, after appearance, it is the practice to serve a summons; and there is good reason for this course. The defendant may be ready to admit the allegation of the bill to be true, to save the expense of an answer; and yet it may be of importance to him, to attend the taking of the account before the Master; for which purpose he puts himself in court. This is frequently the case on bills of foreclosure; the bill stating arrears, to be due,

It is also the practice where the opposite solicitor resides in a different county, and the service is upon an agent, to allow double the time for the return of the summons, or such longer time as the Master thinks proper. (a)

UNDERWRITING.

THE body of the summons being merely to attend, the particular purpose of the meeting is expressed in an underwriting.

In England, when a paper is filed with the Master, no copy is served upon the adverse party, but a summons is taken out, underwritten, *that the party has left the paper*. This is in place of a notice, and the opposite party may apply to the New land Pr. Passim.
1 Turner's Pract. Passim.

(a) By the 50th rule of the Courts of Equity for the several circuits, the summons must be served such reasonable time before the hearing as the Clerk or Master shall direct, but such time must not be less than one week, if the solicitor resides more than 40 miles from the place of hearing, and in other cases not less than three days. This rule is therefore practically the same as that of the Court of Chancery, except in fixing a time of service where the solicitor resides beyond a certain distance.

master for a copy. At the expiration of the time of this warrant, a second is taken out, underwritten, to *proceed upon the paper in question*. If the party does not attend, a third is issued, underwritten, *peremptorily to proceed upon it*; and on the return of this, the examination may be *ex-parte*,

1 Turn. Prac.
44. 176.

It seems also, that if the matter of a particular paper is not disposed of at one hearing, another warrant, and but one, is taken out, underwritten, to *proceed*, or *peremptorily to proceed*; and so successively, until that subject is finished.

1 Turn. Prac.
180. 477.

In some instances no copy of a paper is required from the Master, as where exceptions are taken to a defendant's answer, or his examination is referred for insufficiency. Even in such cases three warrants are used, the two first underwritten to *proceed*, and the last *peremptorily to proceed*.

Ibid. 178.
192.

And three warrants must also be issued, where the party is required to bring in a paper, before he can be put in contempt.

See Blake's
Chan. Prac.
244. 263, &c.

With us the practice is different. The solicitor almost always serves copies of papers filed with the master, upon the adverse solicitor; and generally with a notice of their being such papers.

Fee bill Title
Masters.

The present fee bill allows the Masters to charge for copies of all papers filed with them when furnished at the request of parties. But as the solicitors are also allowed for copies of the same papers served, they of course generally make them.

These rules will shew the proper mode of underwriting a summons with us. If a paper is filed, and no copy is served by the solicitor, a summons must first be taken out, underwritten as in England, *that such paper has been left*. But if a copy of the paper has been served, the first summons must be underwritten *to proceed upon it*; and that should be the underwriting as long as the particular paper is the subject of investigation.

If the reference is conducted without reducing the matter to writing by way of charge, or otherwise, the underwriting must be framed so as briefly to express the object of the meeting. It may be drawn by analogy to such as would be used, if a written statement was filed.

It would expedite business before the Master, if he were allowed a discretionary power in fixing the time for the service of his summons; not less than one day intervening between the service and attendance. The time of service alone is important: whether the summons is dated the same day, or a week before, is immaterial; and therefore the clause of our rule, that the summons must be dated four days before the day

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assigned, when it must be served but three days before, is useless.

There are many cases in which the present length of time produces a needless, and often injurious delay.

Thus in the case of a first warrant on a charge, usually attended only to settle the course of proceedings, or to make admissions; in the numerous cases in which there is no contest of rights, but the parties only attend to see that they are properly stated, or computations of amounts correctly made; cases of exceptions to answers, where the defendant's solicitor must have had the exceptions eight days before the order to refer can be entered, and therefore may be supposed master of the points, in all these, and many other cases, continually occurring in practice, the time of appearing before a Master might be abridged, much to the advantage of suitors, and the credit of the court.

I am inclined to think, from an old order of the court, that the Masters formerly had unlimited discretion as to this point.

“The Masters of the Court shall prefix *convenient, but not over long days* for hearing such matters as are referred to them; and at the times prefixed, shall proceed without admitting any feigned or dilatory excuses, especially that counsel are otherwise employed, or are not instructed, there having been notice and time enough allowed.”

Lord Coven-
try's Orders,
17.
Beames Or-
ders, 79.

It might also be advisable to recognize by a rule, the power of the Master to adjourn the hearing of the particular matter before him. I have no doubt the Court would sanction the exercise of this power whenever the case was brought before it, upon the ground of its being the general course of practice of the Masters, and of the great inconvenience which would result from the want of it.

The English rule however now is, that the Master cannot proceed *de die in diem* (which power would involve that to adjourn to a more distant time) without a special order for the purpose; and without this order, the course is, to serve a warrant for each successive meeting. So burthensome a mode of proceeding, our Court would never endure.

The English rule was not always understood as it is now settled. Lord Alvanley thought that the Master had the right to proceed *de die in diem*. “Motion that the Master should be ordered to proceed *de die in diem* in taxing a solicitor's bill of costs.”

Lingham v.
Sturdy, 5
Vesey, 423.

The Master of the Rolls made the order, but observed, that an order for that purpose is unnecessary, though it was erroneously supposed there must be an order. Where the cause

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Parcell v.
M'Namara,
11 Vesey,
392.

requires it, the Master may, and it is his duty, to proceed *de die in diem* without an order."

"In this case, on a motion that the Master might proceed *de die in diem*, Lord Eldon said, that he took the practice to be different from what was stated by Lord Alvanley, and that there must be an order, but that Lord Alvanley's rule was the best, for the Master must from what he sees, be the best judge of the propriety of it. The order was not imperative on the Master, but he might avail himself of it or not, as the circumstances passing before him call upon him in the exercise of a sound discretion." (a)

One part of our practice upon filing papers with a Master is altogether useless, viz. the giving notice to the opposite party of papers served being copies of those filed. The caption of such papers expresses what they are, and that they are laid before the Master; and regularly a summons is served with the copy. For example, on settling interrogatories, the caption is, "Interrogatories exhibited by the complainants for the examination of the defendant, before A. B. one of the Masters, &c." and a summons must be served underwritten "to settle the interrogatories exhibited by, &c." What propriety can there be, in giving a notice likewise? It is a notice of their being interrogatories for a purpose which is fully expressed in the caption; and that they will be settled at a particular time fully expressed in the summons. The party would be authorized to disregard the notice alone; he must have a summons served upon him. It ought not to be allowed in costs.

SECTION 2.

PROCEEDING EX-PARTE.

IT has been before stated that by the rules of the English Chancery, the Master cannot proceed *ex-parte*, until three successive warrants have been served.

(a) It appears to me, an order like the following might be usefully substituted for the 30th rule.

A Master's summons shall be served such time previous to the day fixed for attendance, as he shall direct therein (not less however than one day, exclusive of the day of service.) On the return of the summons he may proceed *ex-parte*, and on the attendance of either party. He may adjourn the further hearing of a matter before him, from time to time.

Under such a rule, the Master might express the time of service, at the foot of the summons, thus: "To be served the day of its date." "To be served on or before the Instant."

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In the Exchequer, by the ancient practice he could not proceed without a special application. This was amended by an order of court providing that the Deputy Remembrancer should proceed *ex-parte* in all matters referred to him, where the party summoned doth not attend him after three several warrants have been served on his clerk in court. It is probable that these three warrants have been employed in England by analogy to the *Dilationes* of the old civil law. After the libel was delivered to the defendant, the *edictum primum* issued; after ten days from that, if he did not answer, the *edictum secundum*; and after ten days more, the *edictum peremptorium*; after which judgment was pronounced. The attainments of the ancient Masters in civil law-learning support this supposition.

Fowl. Exch.
Pract. 2. 278.
1764.

Code 3. Tit.
9.
Nov. 53.
Cap. 3.

Our rule allows a proceeding *ex-parte* upon the return of one summons. Rule 30.

"Lord Eldon expressed a wish that Masters would be strict upon those who would not attend them, and make reports *ex-parte*; adding that the court would always support them in such cases."

Thompson v.
Lamba, 7 Ves.
sey, 583.
note (a)

"It is the duty of the Master to take the account, though the parties who might resist the claim do not attend, with as much care as if they did; and even with more zeal, for when the parties do appear, it is to be expected they will attend to their own business."

Per Lord
Redesdale,
2 Sch. & Lef.
300.

SECTION 3.

MARKING PAPERS.

"UPON argument in court whether papers were given in evidence before the Master, Lord Chancellor Camden intimated that he would make an order for the Master to mark all papers allowed of in evidence before him."

2 Harrison
Prac. 147.
March 1766.

CAP. II.

SECTION 1.

GENERAL REFERENCE TO STATE AN ACCOUNT.

THE first proceeding upon a reference to state an account, or a reference of a similar nature, must necessarily vary

OFFICE AND DUTIES

according to the situation of the cause. If the account can be sufficiently taken upon the statements of the answer, proofs in the cause, or new evidence to be adduced, a charge may be filed at once, or the parties summoned to make admissions, and settle what is to be contested. The Chancellor, in *Bensen v. Bensen*,¹ lays down as a general rule, that this ought to be the first step in all cases.

Page 220.

It is with apparent reason remarked in Mr. *Blake's* book, that admissions can be made with more precision after the charge is filed, and that such a course is less dilatory : and it is not usual when a charge is resorted to, to take this previous step.

Again the items may be known, though not established. They may then be reduced to form in a charge, and supported by the party's examination or by books and evidence afterwards procured ; or, a charge may be filed in the first instance although imperfect, and materials for a further charge subsequently obtained by examination of the parties or production of books, &c.

¹ Cox's Ca.
58.

But the cause may be in such a state that disclosures of the party, or production of his books, is necessary to form any charge ; as for instance where the defendant has submitted to account without setting forth an account, and this is acquiesced in by the complainant ; or where executors or trustees are plaintiffs, and offer to account merely ; or in a case like that of *Misener v. Burfoot*, where the complainant, praying only for an account, without specifically requiring the items to be set forth by the answer, a general submission to account by the defendants is sufficient.

In such cases, the party's examination must be first procured, or his books and papers produced, to furnish the materials of a charge.

A charge, or an examination of the parties, or a production of his books, may therefore be the first proceeding according to the situation of the cause, and judgment of the solicitor ; and at any period of the reference until the report is drawn, each of these proceedings may be resorted to or repeated, whatever previous step may have been taken.

ante.

The most natural succession seems, however, to be that, which would take place in the most unprepared case, such as that of *Misener v. Burfoot*, viz. a mere submission to account. And the order would then be, 1st. Production of books (probably though not necessarily before the examination) 2nd.

Examination of parties. 3d. Charge and Discharge. 4th. Witnesses. 5th. Applications to the court, and lastly, the Report.

CAP. II.

SECTION 2.

PRODUCTION OF BOOKS, &c.

IF the decree or a separate order authorize the Master to require the production of books and papers in the custody or power of a party, a summons should be taken out, underwritten, "at which time the A. B. &c. are to produce and leave with the Master all books, &c." following the words of the decree.

See the form
Equity
Draftsman.
650, 651, &c.
Appendix,
No. 3.
1 Turner, 182.

Upon the return of the summons, the party must bring in the books, &c. with an affidavit of their being all in his power, or that he ever had, with such exceptions as he may specify therein. For the form see Appendix, No. 4.

The affidavit must be express that the party has no other books. "Defendants made affidavit, that they had no books, evidences, &c. to their knowledge, concerning the matters in question but what were produced before the Master. Held evasive, and they were put to swear, that they had no books or evidence as concerning the matter in question, but what they had already produced."

Viner's
Abridg.
Tit. Chan. 3.
A. pl. 10. cit-
ing Harcourt's
Mss. Tables.

Upon the party's Solicitor attending and praying time for the production of the papers, &c. the Master usually allows a reasonable time for that purpose. If he refuse it, the court may be applied to for an order. If the party neglect to bring in the books, &c. the Master gives a certificate of his default, after taking proof of the due service of the summons, with a proper underwriting. For the form of this certificate. See Appendix, No. 5.

Hands Sol.
Ass. 134.
note.
1 Turner, 183.
See such or-
ders.
Hands Sol.
Ass. 132.
1 Turner's
Prac. 183.

Upon this certificate a motion is made for an order that the party do, within four days after the notice of the order to his clerk in court produce, before the Master, the books, &c. or that the Serjeant at arms take him into custody, &c. By our practice, this order is to produce, &c. or shew cause why an attachment should not issue against him.

See the order.
Hand's Sol.
Ass. 134.

At the expiration of the four days, if the papers are not brought in, another certificate of the default is taken from the Master, which in England, must be dated in strictness the day the motion is made; and an order absolute is then made, for

Carlton v.
Smith, 14
Vesey, 180.
Hand's Sol.
Ass. 133.
notes.
1 Turner, 183.

the Serjeant to apprehend the party ; which he cannot do on the first order. This course is the same in effect as our order to shew cause.

It is not practicable with us, where the Master resides at a distance, from the Chancellor, to pursue the English course in this particular, but the motion for an attachment absolute, ought to be made as speedily after the date of the certificate as possible.

1 Tur. 183.
Hand. Sol.
Ass. 133.
259. Note.

(a) See this
point fully
discussed,
post. Tit.
Exam. of
Parties, note
(a).
Edwards v.
Poole,
Dickens, 693.

The first order, to produce is obtained upon a motion of course, that is, without notice. It may therefore be entered at the Register's or assistant Register's office, under the *fifty ninth rule*, upon filing the Masters certificate, without an application in open Court. (a) The service of the first order is equivalent to a notice of the second motion, which is therefore the same as a special motion ; and must be made to the Chancellor directly, as the alternative is, to shew cause. When the Court sits in the place in which the reference is conducted, the motion is made, on the day of the expiration of the rule nisi, but in other cases, a difficulty arises, because the motion to make the rule absolute cannot be made until that day ^{and} is made upon a second certificate of the Master of the default, dated that day or after. The adverse party has no notice of the application except for that day, and of course it is often impracticable then to make the motion. It has on this account been considered by some judicious practitioners that the safe course is, to give notice of the motion for the attachment to issue, after the expiration of the first order—and that then the court will either make it absolute at once, or give a short time, and in default allow the attachment to issue as of course, making that part of the order.

See the order
Equity
Draftsman,
599.

If the party is brought up on the attachment, and persists in contempt, an order is made to commit him to prison, and the court will of course grant a sequestration ; which it will also do, if the return is, *non est inventus*.

If the party produces some papers, and states in his affidavit others once in his custody and not produced, with the reasons of the omission, the Master is to judge of the sufficiency of the explanation ; and if the affidavit is not satisfactory, or there is not proper cause for withholding the particular papers, a summons should be taken out underwritten to produce them specifically. The Certificate of default relates to such papers merely, and a copy of the affidavit should be annexed. The Court will then have the whole matter before it, upon the motion for an attachment. For the certificate in such case, see Appendix, No. 6.

And if the Master should think the papers ought not to be produced, a copy of the affidavit should be taken from him, and a motion made upon notice for the party to bring them in.

Where the party believes other documents are possessed, besides those produced, interrogatories may be exhibited, or with us the party summoned before the Master, and orally examined touching them. If the examination prove others to be in his power, he should be summoned to bring them in. The following case, and that of *Lupton v. White*, cited in it, sanction this practice, and are illustrative of all the rules on this subject.

Remsen v.
Remsen,

"The bill was filed against a solicitor executor of a solicitor, charging that he had improperly used the papers of his Testator, to obtain advantages in his profession. The usual decree for an account was made, with the usual directions that the parties should produce all books &c. as the Master should direct.

Cotton v.
Harvey,
12 Vesey, 391.

A motion was made that the Master should certify whether he was satisfied or not with the production made by the defendant upon the ground that it appeared from his examination, there were certain bills of costs in his possession which he had not produced; and the case of *White v. Lupton* was cited, in which an order was made the defendant should produce, &c. The Master certified he was satisfied with the production. An application was then made for an order that the Master should receive further interrogatories for the examination of the defendant. Lord Eldon thought the production not satisfactory. No order was made, the Master on being informed of the Lord Chancellor's opinion, receiving the interrogatories. On the other side it was said, that *White v. Lupton* was not an authority for the order desired, for there the Master had voluntarily given the certificate. That the most convenient and reasonable course was, if there was reason to suppose the defendant had not made a full disclosure, to lay a ground by affidavit stating the papers which he ought to produce. Some affidavit was necessary as this was a suggestion that the Master had not done his duty. The proper mode of appeal from the Masters judgment is without a certificate, an application that he shall in addition call for the production of those bills.

Lord Chancellor.—I find that it is not usual, when the Master is satisfied that there has been a full production, to certify his satisfaction. It does not appear that in *White v. Lupton*, Lord Eldon would not have made the order desired, if it had been necessary. There must be some mode of correcting the judgment of the Master if he has been satisfied, when he

ought not to have been satisfied. There is a clear right to an enquiry, whether the defendant has such papers or not.

A motion was afterwards made for an order, that the plaintiff might exhibit fresh Interrogatories, upon the ground, that the defendant had not given sufficient evidence of his having produced all the papers in his possession. He had stated in his examination, that he had several bills of costs, &c. and many, which he referred to, were not produced. He made a general affidavit, that he had brought in all he could find.

The motion stood over to give the defendant an opportunity to make a more particular affidavit.

When the solicitor would inspect the books, &c. left with the Master, he must take out a summons for that purpose, that the opposite solicitor may attend if he thinks proper. Without this, the Master should not allow an inspection. It is underwritten, "To inspect the books and papers left by the —."

After an attendance by the adverse solicitor, or a service of three warrants, if he does not attend, a further inspection may be had on any subsequent warrant.—Of course, by our practice, after one summons, the Master may adjourn for another inspection, whether the opposite solicitor attends or not.

If the party has procured the production of the books, and afterwards requires an examination from the defendants, it may be necessary that the books should be re-delivered to enable them to prepare it.

Page 137.

In *Hand's Solicitor's Assistant*, is the form of an order in such a case, made upon notice, which recites an affidavit of the defendant stating that the plaintiffs had filed interrogatories for the defendant's examination, that his books and vouchers had been left with the Master, and he could not put in such examination without them, and that it would be injurious to his business to attend at the Master's office for that purpose, and ordered that the several books specified in the order should be delivered to the defendant, that the plaintiffs be at liberty to inspect them while in his custody, giving reasonable notice, and that they be returned when the examination was put in, in the same state and condition.

There are some decisions upon a production before hearing, which are applicable to the present subject.

"Motion to produce and leave with his clerk in court certain books of account, admitted in the defendant's answer to contain entries relating to plaintiff's demands, as well as other transactions. Lord Chancellor—There being no affidavit that the books are in daily use, the proper order is, that the defend-

Fowler's
Ex-h. Prac.
2. 299.
1 Turner's
Prac. 184.

Ibid.

Beard v.
Penswick,
1 Swanston.
533. See
also Jones v.
Powell. Ibid.
note (b)

ant shall leave them with his clerk in court, sealing up such parts as do not concern the plaintiff, and pledging himself by oath that he has sealed up those parts only." So in *Campbell* 2 Cox. 286. v. *French*, it is stated, "that the case often occurs in the court, that where parties are directed to produce books of account, they are permitted to seal up and conceal all the other parts of the books relating to other accounts."

In the same case as reported, 1st Anstr. 58. the defendants set forth extracts of letters, stating in their answer that they had set forth all the parts of letters in their possession relating to that business. The plaintiffs required the letters themselves to be produced. By the court.—"The defendants swear to have produced extracts of every thing relating to those bills, the other parts of the letters are not relating to them; they have sworn at their peril, but very fully, and we cannot order a production of the other correspondence, as we have no inquisitorial authority to investigate all the other transactions of these merchants. So when a party refers to extracts from books of accounts, those parts which he states to be immaterial are left sealed up."

If books are produced before the Master, with portions sealed up, the party's oath of their not relating to the matters in question must be taken in the first instance, as sufficient. But if the adverse party can shew any fair ground for supposing any part has been sealed which is material, whether designedly or not, he may require it to be opened; and if this is refused, upon certificate of the Master that in his opinion such part should be opened, the court would compel it.

CAP. II.

SECTION 3.

EXAMINATION OF PARTIES.

Under this head are considered,

1st. The nature of an examination.

2d. When a Master may examine parties; and who are parties in this respect; and who has a right to call upon him to examine them.

3d. The mode of procuring and taking such examination in England.

4th. The manner of correcting the errors of the Master.

5th. The mode of proceeding upon a *viva voce* examination in our State.

1st. It is important to ascertain the true nature of an examination, that the questions concerning it which are not expressly decided, may be understood.

An examination is in the nature of an *answer* or *further answer* of a party, after a decree.

It is an *answer* or *further answer*, because it may be required from a plaintiff, as from an executor filing a bill for directions and indemnity. When from a defendant who has answered, it is a further answer.

The following authorities prove this to be the nature of an examination.

Fowl. Exch.
Pr. 2. 294.

"The examination of a party to interrogatories after a hearing is considered in the nature of an answer to a bill before the hearing, and to which exceptions may in like manner be taken.

Howard
Equit. vide 1.
33.

"If the answer to personal interrogatories be short, the opposite party may except thereto, and these exceptions are to be referred to a Baron, and to be proceeded on in the same manner, with exceptions to short answers to bills. The defendant is not to be examined upon these personal interrogatories, as witnesses are upon the other interrogatories, he is to answer them in the same manner as he does the plaintiff's bill."

The Jurat to an examination is the same, as to an answer.

3 Atk. 511.

In an anonymous case in *Atkyns*, Lord Hardwicke, compares the filing fresh interrogatories, after an examination certified insufficient, to amendments of a bill after an answer, reported insufficient.

Sir S. Rom-
illy.
Hatch v. —
19 Vesey, 116.

"Examinations are just the same as answers. In principle there can be no distinction between them."

And the objects of an examination are precisely those of an answer: viz. to furnish the means by his own statements of charging the examinant in account, of obtaining a decree against him, of sifting on his own oath, his demands, or invalidating his defence to a claim.

2 Johnson.
C. R.
Remsen v.
Remsen.

2d. The Master cannot examine parties, without the permission of the court. "No witness in chief examined before publication, nor the parties ought to be examined before the Master, without an order for that purpose." But under the general authority given in the decree, he may examine as often

Cornish v.
Acton,

as he thinks proper, and to the same, or new matters. "The

defendant was examined before the Master on the account decreed. Afterwards he was re-examined upon new interrogatories without an order. Lord Hardwicke held, the Master might regularly do it, as in the course of the cause, new matter might arise, and it was in his discretion, the decree giving it to him: The words are, "the parties are to be examined upon interrogatories, as the Master shall direct." "It was settled by Lord Hardwicke, that a Master could re-examine a party in the cause without leave, because the decree was, that he might examine parties as he should see fit."

Dickens 149.
2 Ves. sen.
270. S. C.
cited as
Cowslaid v.
Cornish.
1751.
Willan v.
Willan.
Cooper's
cases in
Chancery,
290.

A prior case before Lord Hardwicke is somewhat at variance with this decision. "An order was obtained as of course for liberty to add new interrogatories, the examination being reported insufficient, and to answer both sets at once. Lord Hardwicke said, that he found no instance of such an order on a motion of course: It had some analogy to orders for amendments of bills, where answers have been reported insufficient. If the party wants to add new interrogatories, he should apply to the court on notice, that the Court may be apprized whether there is ground for it." If Lord Hardwicke thought that new matter arising in the course of the cause was good reason for exhibiting fresh interrogatories without an order, after a *sufficient* examination; what ground can there be for not allowing the Master to receive new interrogatories, after an examination certified *insufficient*? I take them to be new interrogatories to new matters. But with us all difficulty upon this subject is removed by our rule requiring the defendant after an answer reported insufficient, to answer amendments to the bill together with the original exceptions. New interrogatories are the same as amendments to a bill, or more strictly, as the exceptions founded upon them. Now unquestionably, if this is permitted by the general rule, the Master may by analogy, receive fresh interrogatories without an order.

Anon. May
21. 1747,
3 Atkins,
511.

Rule 15.

In *Lynn v. Buck*, the Master refused to allow further interrogatories for the examination of the defendant, which comprehended more than the original interrogatories. On a motion for liberty to exhibit them, a *Mss.* case was cited in which the Lord Chancellor had thought the Master right in refusing to allow additional interrogatories, and made a special order.

Lynn v.
Buck.
3 Mad. Rep.
281.
Wood v.
Milburn,
May 1801,

The *Vice Chancellor*.—My impression is, that if there was a slip in the interrogatories as first exhibited, the Master was at liberty without any application to the Court, to admit of additional interrogatories. The motion stood over for the plaintiff to exhibit the further interrogatories with an intima-

tion of the opinion of the Court. If the Master still refused, he would consider what was to be done."

I find nothing further of this cause. It appears probable that the Lord Chancellor's decision in the *Miss* case cited above was founded on the particular nature of the additional interrogatories, not on the want of power in the Master to receive them, if proper.

It is stated, "he thought the Master right in refusing to allow the *additional interrogatories*, but gave the plaintiff leave to exhibit fresh interrogatories." If the *additional* had been proper, liberty would have been given to exhibit them.

13 Vesey, 262.
2 Coxes
cases. 196.

See also *Simmons v. Gutteridge*, post, and *Ex-parte Saunderson*, post, which last is a clear authority for a Master's power to re-examine to the same matters without an order.

It is scarcely necessary to observe, that the defendant is sometimes the actor in taking the account, and is to exhibit the interrogatories, as where the bill is by a trustee or executor, to settle the estate.

So he may examine the plaintiff in cases, where there are mutual accounts to be investigated.

I conceive that the Master may receive interrogatories or farther interrogatories from any party in the cause, for the examination of any other party, without an order.

*Simmons v.
Gutteridge*,
13 Vesey,
262.

The usual decree was made, under a bill by legatees for an account against executors.

The usual examination had taken place, and a year after some defendants also entitled as legatees and next of kin, applied to the Master to exhibit an interrogatory for the examination of the executor, whether he was indebted to the testator. The Master refused to receive it, and a motion was now made to the Court for an order.

The motion was resisted, counsel insisting that a defendant could not exhibit interrogatories for the examination of a co-defendant. Such an application was repeatedly refused by Lord Eldon in *Allen v. Miller*; an account decreed against two executors, one of whom wished to shew, that the other had received the whole. At least it ought to be made upon evidence.

On the other side it was said, that in such cases all parties are actors, and every legatee being a party may exhibit interrogatories. Lord Chancellor said, the question was, whether the defendants, being legatees, could, as of course in every case, exhibit such an interrogatory, merely asking the question, whether the other defendant was indebted to the testator, not embarrassing the cause with a long and complicated account, in which case they would be required to file a bill. If the

answer is, that there is a long account, and he cannot say the balance is against him, the Master must take that answer, and a bill must be filed. I think the interrogatory should be received. This reduces it to the point, whether a legatee has a right to exhibit the interrogatory. A legatee may suggest that the interrogatories are defective, with a view to introduce that which ought to be in every decree for an account against an executor. It proceeds upon this, that this is the interrogatory not of the party, but of the Master, an interrogatory which the Master ought to put in every case. The order was for liberty to exhibit the interrogatory."

The case of *Allen v. Miller* must have been upon the principle that the examination would have been wholly useless, Lord Eldon strongly holding, that *Executors* joined in a receipt are both liable, whoever received the money; otherwise his refusal of permission to examine, would be directly ^{contradictory} to his decision in *Colquhoun v. Franklin*.

The case of *Ladler v. Lushington*, cited by Counsel, seems ^{Post.} to have been one of a stated account between the executor and testator, which Lord Alvanley said, the Master did right not to unravel. A strong case was necessary.

If the party has been examined in chief before the decree as a witness under the usual order for a plaintiff or a defendant to examine a defendant, the Master has not a right to examine him under the general authority.—There must be a special order obtained from the court.

"A motion was made, as of course, on behalf of the defendant M'Namara, that the other defendant, Purcell, might be examined upon interrogatories before the Master. The motion was made after the decree; and this defendant had been examined *in chief* and *cross examined*. Lord Chancellor said,—Though the usual direction is to examine the parties, as the Master shall think fit, the practice has been long settled, that a Master cannot without an order, examine a party, who has been previously examined; that it is not of course, but in the discretion of the court to grant or refuse it. After consulting the Master who wished to examine the defendant to certain points, the following order was made. "Let the Master be at liberty to examine the defendant Purcell upon interrogatories to such of the points in this cause to which *she has not yet been examined*, as the Master shall think it reasonable that she be examined to, and the Master is to settle the interrogatories." And although a defendant has not been examined previous to the decree, he cannot be examined as a *witness* on behalf of another defendant under the general words of the decree.

Purcell v.
M'Namara,
17 Vesey, 484.

See Post. as
to this part of
the order.

Franklin v.
Colquhoun,
10 Vesey, 218.

A special motion must be made for an order. "A reference had been directed to the Master to review his report, and to enquire by whom a sum of money, charged to two defendants trustees (from having jointly signed the receipt) was actually received. *An order was obtained* by one of the defendants to examine the other, and on motion to discharge it, Lord Eldon said,—Previously to a decree, one defendant may move to examine another, saving just exceptions; otherwise a witness would be made a defendant merely to deprive the other party of his testimony. I have always thought that not a *motion of course* after a decree, though a *special ground* may be laid, and it would be difficult to state a stronger case than where all the trustees being answerable *prima facie*, circumstances may show, that some only ought to be answerable.—Motion denied."

In these two cases, the defendant is examined not as a party, but as a witness for another defendant; in the last to discharge one party from a *prima facie* joint debt by the oath of the other, who in any event was chargeable.

It is also of importance to understand when the testimony of a party, examined as a witness, is legal evidence.

16 Vesey,
218.

Lee v. Atkin-
son, 2 Cox.
Ca. 413.

It is of course before hearing, to obtain an order for a plaintiff or co-defendant to examine a defendant as a witness, upon an allegation that he is not interested, saving just exceptions, and the allegation that the party is not interested in the order does not seem necessary. It is a motion of course, and the question how far the party was a competent witness must be raised at the hearing of the cause, and when the deposition is offered to be read in evidence.

Murray v.
Shadwell,
2 Ves. & Bea.
401.

The interest which must be shewn in order to suppress the deposition is not an interest in the cause, but an interest in the matter to be examined to. "Three Trustees were charged with breaches of trust. One of the defendants obtained an order at the Rolls for the examination of an other defendant upon a petition stating she was a material witness, and though interested in the matters in question in the cause, was no way interested in the points to which she was desirous of examining him. On a motion to discharge this order, Lord Chancellor said, that in whatever terms the allegation in the order as to the party's interest, was expressed, it must really mean, that the party is not interested in the matter to which he is to be examined. That the general practice requiring an allegation of no interest in the matters in question in the cause arose from this, that though the defendant might not have a direct interest in the matter to be examined to, he yet might have an interest in the result of the cause in other matters, which

may be affected by the examination : he may derive a benefit, by his examination to those points in which he has no interest. The real meaning of the general allegation being, that he has no interest in the matters to be examined to, but if in the result of the cause it turns out that he has an interest in those matters by reason of his interest in the others, the deposition cannot be read." So in *Nightingale v. Dodd*, a decree was had against a defendant who had been examined, upon different matters. "Order that Buck, one of the defendants, should be examined as a witness for the plaintiff, saving just exceptions. Buck was interested in the cause, but not in the matter to which he was examined. It was insisted at the hearing, that the plaintiff having examined Buck as a witness, could not pray any decree against him. But the Court said suggestions in orders of this kind, viz. that the defendant is not interested, must relate to the matters whereto he is examined : if he is examined to other matters wherein he is concerned, he may demur, and the Court ordered Buck to account." "The bill was filed against an administrator, charging fraudulent acts, and among others that he had fraudulently charged to the estate a sum of money as paid to the defendant R. which he knew was not due, and had not paid. And that the account was collusively made between these defendants. Ambler, 583.

Petition of the defendant the administrator to examine the defendant R. as a witness before the Master, to prove the application of the assets ~~and~~ to his hands.

The Chancellor,—The defendant is charged as *particeps criminis* to some of the transactions. He is called to swear to the truth and justness of the charges made on his part, and to the payments made on the part of the other defendant, and which are charged as being the result of collusion. If the charge be true, he must not only answer in costs, but he loses the advantage of the settlement he has made with the other defendant, and he will be ultimately responsible for the money. He is therefore on the face of the pleadings, not only a *particeps criminis*, but he has an interest in the result of the cause. He is therefore clearly an incompetent witness."

So a defendant clearly cannot examine a plaintiff as a witness without an order, as well by analogy to the rule in *Colquhoun v. Franklin*, as because a special order is necessary before hearing, and it has been doubted whether it could be done at all. It has been done in a late case, the plaintiff consenting, saving all exceptions. See Dickson, 650. 1 P. Wms. 595. Walker v. Wingfield, 15 Vesey, 178. 15 Vesey, 178.

"The Master of the Rolls had made an order on motion of the defendant for the examination of a plaintiff, saving just ex-

ceptions ; the plaintiff consenting to be examined. The Register doubting as to the regularity of the order, it was mentioned again.

The Bill was by some persons claiming as next of kin against others. One of the defendants wished to examine the plaintiff, to shew he was in the same degree of relationship with himself and entitled, if he was so. The Master of the Rolls said this was not the case of one Plaintiff examining a Co-plaintiff, nor a defendant examining an involuntary plaintiff ; but a case in which the plaintiff consents to be examined by the defendant. The question may be made at the hearing, whether the relation and situation of the parties are such, that it is fit that the deposition should be read : but he thought the order might be made, saving just exceptions."

I am not aware of any objections to the examination of a Plaintiff by a defendant as a witness, except it come from a plaintiff himself on the score of his not being obliged to testify against his own interest. This was obviated in the case in *Dickens*, and that in *15 Vesey*, by the plaintiff's consenting to be examined. So at law, where one of several co-plaintiffs voluntarily came forward as a witness to prove the defendant not chargeable, he was admitted by consent of the defendant. *q*)

If the plaintiff is an immaterial party, the defendant may demur.

A plaintiff cannot have an order to examine a co-plaintiff as a witness before hearing ; nor of course after hearing.

" Plaintiff moved to examine a co-plaintiff saving just exceptions.

Upon his Lordship's consulting with the Register it appeared to be the rule, that no co-plaintiff ought to be examined as a witness on the behalf of the plaintiff ; there being this apparent exception to him, viz. his being liable to answer costs, if the event of the cause should prove against him." And the course as now settled is, to move to strike out the co-plaintiff's name (and make him a defendant if necessary) amending defendant's copy of the bill, and securing the costs to the time.

The result of these authorities seems to be, that a party on the record cannot be examined *as a witness* on behalf of another party, without an order of the Court. And the distinction as to the character in which he is to be examined must be observed : *as a party*, he is examined in order to charge himself in the cause, or to sift the validity of his own claim by his

See Pr. Register, 419.
2 Ch. Cases, 208.

Jefferson v. Dawson,
Phillips on Evidence,
60. 207.
4 Hen. & Munford, 488.

1 P. Wms. 595.

(*a*) *Norden v. Williamson,*
1 Taunton, 378.

Mayor of Colchester v. —,

1 P. Wms. 595. See also,
1 Vernon, 23. and
Prec. in Ch. 411.

Lloyd v. Maheam,
6 Vesey, 144.
and cases there cited.

own statements; *as a witness*, he is examined to establish or aid the claim or defence of a party against another party.

It is of importance to keep this distinction in view; if the party is examined *as a party* with a view to charge him, or to invalidate his claims, this examination is nothing but a continuation of his answer, and the interrogatories are like further charges of an amended Bill—of course there can be no such proceeding as a cross examination. The question is between the party examining and the Examinant; and the latter answers in such manner as he thinks proper under the advice of Counsel. But if he is examined as a witness on behalf of one party, and his testimony is to affect directly a third party, then as a witness that third party has a right to cross interrogate him.

To illustrate, this if a plaintiff require the examination of a defendant executor, as to his own act of ~~charging~~^{charging} a safe to a bad security, with a view to charge him, he is examined as a party; but if the examination is to be as to the same act done by a Co-Executor, he is to testify as a witness. So in the case 16 Ves. 218. cited, *Franklyn v. Colquhan*, the defendant who was to be examined was produced to prove that he had actually received the whole of a sum of money, with which the defendant applying to examine him was chargeable, having joined in the receipt as trustee. Of course, he was a witness, and the plaintiff would be permitted to cross examine him.

The mode of examining in England is generally by written interrogatories to which a written answer is put in. Newland's Pr. 160.
Turner's do.

The general form of the decree is to examine all parties upon interrogatories, and in such case the Master must be restricted to that mode. But in England the Court sometimes has authorized a *viva voce* Examination. Eq. Draftsman, 650, 651.

“On a reference to the Master with liberty for him to examine all parties on interrogatories, or otherwise, as he should think fit; the Master examined them on interrogatories; but there being very strong contradictions in the examinations, the Master wished to examine the parties *viva voce*, but did not conceive himself at liberty so to do, under the former order, especially after having once examined them on interrogatories. The petition prayed an order for the purpose. The Lord Chancellor thought clearly, that under the former order, the Master might have examined the parties *viva voce*, even after he had examined them on interrogatories. However he made the order.” Ex-parte, Saunderson, 2 Cox's Cases in Ch. 196. 1787.

“Chancellor Kent observed, that the usual course laid down in the English books was, to exhibit interrogatories for the Remsen v. Remsen, 2 J. Chan. 499.

examination of parties or witnesses, but he did not conceive it indispensable; that the practice of oral examination had generally prevailed here." He then states the practice to be observed here, thus, "That the proofs be taken on written interrogatories approved by the Master, or by *viva voce* examination, as the parties shall deem expedient, or the Master shall direct."

The Chancellor plainly means by the word "proofs" the examination of the parties, as well as the testimony of witnesses. This clearly appears from other parts of his opinion.

If the decree therefore is general, "That the Master may examine parties," or, "examine them upon interrogatories, or otherwise," the mode is in his discretion. The English books furnish nothing of the course of practice upon an oral examination; but that, upon written interrogatories, will by analogy, supply the rules.

I shall therefore trace out that practice first.

12 Vesey, 391.

The interrogatories must be settled by the Master; that is judged and formally approved of by him.

Coopers cases
291. New-
land Pract.
161.

"Interrogatories for the examination of parties are settled by the Master, though they are frequently prepared by the solicitor or counsel."

Vol. 1. page
171. Ibid.
175. and 18.
Vesey, 287.

This rule implies that interrogatories may be framed by the Master, and accordingly in *Turner's Practice*, is a set of standing interrogatories, settled by Master *Harvey*, for the examination of executors in his office: They need not be signed by counsel. See Appendix No. 8, for the form of interrogatories.

The interrogatories being prepared, a copy is served, with a summons, underwritten, "to settle the interrogatories left by the — for the examination of the —." It was before observed that a notice accompanying the copy served, was useless. On the return of the summons, the Master, upon attendance, or an affidavit of the service of the summons, and a copy of the interrogatories, will consider them.

If the party objects to any of the interrogatories, and the objection appears upon the face of them, it may be discussed at once.

1 Turner,
176.

If the objections arise from extrinsic matter, the party must bring that matter before the Master by a state of facts.

Paxton v.
Douglass,
16 Vesey,
239. & 2 Tur-
ner, 168. n.
a. S. C.

"Thus, on a bill filed by creditors, on behalf of themselves and others, *Christie* claimed to be a bond creditor. Interrogatories were filed for his examination before the Master, inquiring as to the consideration of the bond, whether it was not given for the purchase money of the command of an East India Company ship, sold by *Christie* to *Douglass*, *Christie*

brought in a *state of facts* before the Master, setting out a by-law of the company.—That a commander, selling his command, should be rendered incapable of future employ; that the ship might be discharged, and the parties should pay damages to the company, at the rate of double the sum received or paid, and clauses to such effect should be inserted in all shipping agreements. On the ground of these penalties, he objected to answer."

For the same reason as in the case of interrogatories; the opposite party must be served with a copy of the *state of facts*, by the solicitor, and a summons taken out underwritten. "To proceed on the state of facts left by A. B." On the return of this, the objection is discussed. The Master having determined upon the interrogatories, signs an allowance at the foot of the ingrossment. It is stated in all the books of practice, that the Master gives a certificate of his allowance of the interrogatories, which is filed in the report office, (of course here with the register.)

Such is the course of practice laid down in the books. There is however an early rule revived by a late decision, which appears to me to warrant a beneficial change in it.

It is now fully settled that exceptions will not lie to the certificate of allowance of interrogatories.

The cases upon this point are these:

The Master having certified, he had settled interrogatories for the examination of the defendant, the defendant took exceptions to the report, that they led to matters not in issue.

It was argued, that excepting to a Master's certificate of his having settled interrogatories, was new in practice; and the Master was the proper judge of the propriety of the interrogatories.

Lord Thurlow directed the Register to attend Sir *Thomas Sewall*, Master of the Rolls, on the subject. His Honor was clear the Master must settle the interrogatories; that the party was to put in such examination as he thought proper. If not sufficient, it would be referred, and the Master would report his opinion, and to this report either side might take exception; and the court, then having the interrogatories and examination before it, would determine whether the examination was sufficient or not. On making known to his lordship, what his honor had said, his lordship was clear, this was the proper course of proceeding."

It appears however, that the practice subsequently did not follow this decision.

1 Turner,
176. 5 Edition.
Ibid.
See Appendix,
No. 7.
1 Turner,
177. Newland,
161.
Blake, 234.
Fowler's
Exch. Pr. 1.
293.

Stamford v.
Tudor, Dickens,
548.

Hughes v.
Williams, 6
Vesey, 459.

"The plaintiff was to be examined upon interrogatories, which were settled by the Master. A petition was presented to expunge certain parts as impertinent.

Lord Chancellor said,—He had no doubt, exceptions would do; but it was very questionable whether it could be done by petition. And afterwards that he was quite satisfied the proceedings upon the impertinence of interrogatories may be by exceptions, which were filed accordingly."

18 Vesey,
240. 2 Turner,
Pr. 168.
n. (a).

The case of *Paxton v. Douglass*, overruled this practice, and restored that in *Stamford v. Tudor*.

"Exceptions were taken to the Master's certificate, of having settled interrogatories for the examination of a bond creditor coming in under a decree, and Lord Eldon cited *Stamford v. Tudor*, and said,—My opinion at present is, that the objection is not to putting the question, but to answering it, when put; that the witness is before the Master precisely in the situation of a witness called to give his evidence personally, for the objection is not to the question, but to the answering it. I therefore think that the interrogatories must be put to the witness, and it must be left to himself whether he will answer them or not."

His Lordship afterwards said, "The exception should be, not to the propriety of the interrogatories, but to the Master's certificate of what he does after interrogatories are addressed to the witness. Exceptions disallowed."

2 Turner,
168. (note a.)

Afterwards the defendant put in his examination, which was referred and certified insufficient. An exception was taken to this certificate and allowed. Although Lord Eldon uses loosely the term *witness*, yet it is clearly the case of a party, or as Lord Hardwicke calls a creditor coming in, *quasi a party*. He was to be examined to his own claim.

1 Vol. 177.

Mr. Turner cites this case as overruling *Hughes v. Williams*.

This practice is decidedly preferable. It is least dilatory, and will in many cases prevent two references.

Thus after a certificate of settling the interrogatories had been excepted to, and their propriety determined by the court, the examination might be referred for insufficiency, and the report upon that excepted to, and carried before the court. But if the practice of *Stamford v. Tudor*, and *Paxton v. Douglass*, is established, every point whether the interrogatories are objectionable and need not be answered, or the examination is full and sufficient, may be settled on one reference, and one hearing before the court.

These decisions have led me to conclude, that a part of the course of practice upon this subject as before detailed has been rendered useless, and should be altered : And such alteration would be very beneficial.

The summoning of the opposite party to attend upon settling the interrogatories, and the discussion of objections to their propriety at that time is wholly unnecessary. If he appear and discuss them, and the Master's judgment is against him, he has then no remedy by applying to the court. He must put in his examination, in which undoubtedly he will take the same objections, or refuse to answer, relying upon them. Then the subject is to be again brought before the Master upon a reference of his examination, and upon ^{the} report carried before the court. All that is obtained is a double discussion before the Master, undoubtedly not important enough to justify the additional delay and expense. It certainly may be presumed in the first instance that the interrogatories are proper, when a Master has allowed them. His settling them is a substitute for the signature of counsel.

2 Fow. Rep.
Pr. 293.

It is the security which the court takes instead of a counsel's hand, against the impertinence, scandal or prolixity of the paper; and it is done by the Master, because he is to judge whether any interrogatories are proper ; whether it is necessary to examine the party at all. I feel therefore great confidence in the opinion, that the court would sanction the course of procuring the Master to settle interrogatories without any summons to the other party, and serving a copy when settled, together with a summons to bring in his examination. The objections to answer the interrogatories, or any of them, may be stated in the examination, in the same manner, as a ground of defence against answering is set forth in a plea or answer ; or upon a reference for insufficiency it may be shewn that they are immaterial or improper, as upon a reference of an answer. For the form of such an examination, see Appendix, No. 12.

It appears to me also, that since the decision, that exceptions will not lie to the certificate of allowance of the interrogatories, that certificate may be dispensed with, and the costs (of attending, drawing and filing, &c.) be saved. What purpose can it serve, unless it can be the mean of bringing the interrogatories before the court ? In case of a default indeed in putting in the examination, it is necessary that the court should be informed by the Master that he has settled the interrogatories ; but this may as well be made part of the certificate of default, as stated in a separate one.

If indeed the interrogatories are impertinent and scandalous, there can be no objection to the parties referring them as he

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may any other pleading or proceeding in the court. A discharge has been referred for impertinence. But allowing that step to be taken by a party, at the risk of considerable costs, is very different in principle from requiring that in every case the delay and expense of a discussion before the Master, or a meeting at least upon the interrogatories, should take place.

1 Turner.

After the interrogatories are settled, the party is summoned to bring in his examination by a warrant, underwritten, "at which time the defendants are to bring in their examination, to the interrogatories settled by the Master."

Newland,
161, 162.

It appears that in England, he may apply during the running of the first warrant for a copy of the interrogatories as settled. With ~~as~~ the copy should be taken from the Master by the solicitor filing the interrogatories, and served with the summons. The Master ought to examine and subscribe his allowance on the copy to be served.

If the defendant has attended with his copy of the interrogatories, it may be marked allowed by the Master, after the alterations made, if any. If no alterations are made, there can be no doubt, that it would be needless to serve a fresh copy. The underwriting of the summons to bring in the examination, might, in such case, run, "to bring in the examination, &c. to the interrogatories settled by the Master, being the interrogatories heretofore served."

Of course, if the practice suggested should prevail, the copy of the interrogatories as settled would be the only copy served, and served with the summons to bring in the examination.

1 Turner,
177. Hand's,
Sol. Ass. 138.

The Master may give the party a reasonable time to bring in his examination, or if refused, the court may be applied to.

If default is made in putting in the examination at the limited time, an affidavit must be laid before the Master of the service of the summons, and of a copy of the settled interrogatories. Upon this the Master will give a certificate that the examination is not put in. For the form, see appendix, No. 9.

If the party has procured time from the Master, and then is in default, the affidavit of service is not made, but the certificate states the attendance and time given.

Upon this certificate the court is applied to for process against the party to procure the examination.

The English practice to effect this is the same as where the party is in default, in not producing books, which was before stated.

Hand's Sol.
Ass. 263.
note. 1 Tur-
ner's Prac.

The first order is, *upon a motion of course*, that the defendants put in their examination within four days after personal notice of the order to their clerk in court, or in default, that

the serjeant at arms apprehend them, and bring them to the bar of the court. 178. Equity Draft. 593.

At the expiration of this time, the Master gives another certificate, upon which another motion is made, that the serjeant take the defendant. By our practice the first order is, to put in the examination within four days, or show cause why an attachment should not issue.

"On reading and filing a certificate of *I. A. H.* one, &c. stating (substance of certificate) and on motion of Mr. Harrison of counsel for the complainant, ordered, that the said defendant file with the said Master his examination, and answer to the said additional interrogatories within four days after service of a copy of this order, or show cause why an attachment should not issue against him. And further that service of a copy of this order upon the defendant's solicitor be deemed good service." "On reading and filing a certificate of *M. H.* one, &c. by which it appears that the defendants are in default in not having brought in their examination, it is thereupon, and on motion of *S. S. G.* of counsel for the complainant, ordered, that the said defendants bring in their examination in four days after service of a copy of this order, or show cause why an attachment should not issue against them. And that service on the solicitor be deemed good service." Stoughton v. Lynch, Ass. Reg. Lib. for 1815, page 199. Oct. 4, 1815.

Both the foregoing orders were obtained upon motion in open court, but the court was here in term at the time, and both were obtained *without notice*.

It appears to me unquestionable, that the first order in the alternative, may be entered in the Register's or assistant Register's office, as a common order under the *fifty ninth rule*. (a)

(a) In several cases and particularly motions connected with process for contempt, solicitors have hesitated in entering orders, which unquestionably are orders of course in England, without a direct application to the court, and sometimes have even resorted to notice.

The point as applicable to the motions for such process in cases of a default, in bringing in an examination or production of books, &c. is connected with the present subjects and deserving attention for the general importance of the rules upon it.

Our rule (59th) provides, that certain orders therein particularized, and also every order to which a party would according to the practice of the court, be entitled of course, without shewing special cause, shall be called *common orders*, and may be entered in term or vacation, with the Register or assistant Register, at his office, at the peril of the party taking it; all other orders are special orders.

Then the question always must be, is the order sought for, an order of course, by the practice of the court.

Nestell v. Nestell, Ass. Reg. Lib. 1820. page 282. 24 June, 1826.

If the party is taken on the attachment, he will either be allowed further time, undertaking that the sheriff may go without further order in case of default; or he will be committed till he puts in his examination, in the discretion of the court.

Bonus v.
Flack, 18
Vebey, 287.

After the party has put in his examination, he must get a certificate of the fact from the Master, before he can be discharged from custody. The examination need not be signed by counsel. It is sworn to, and the *Jurat* is the same as to an answer.

For the reasons before noticed, a copy of the examination is served by the solicitor, instead of being supplied by the Master as in England. For the form of an examination, see appendix, No. 10.

3 Atk. 503.

Clearly there is no settled practice in our own court making a rule to bring in an examination, or to produce books, or *shew cause why*, &c. a *special* order. The cases of such applications have been very rare. Then the point is to be settled by English practice. In the English chancery there is no such provision as the above rule. Every motion for an order, whether of *course*, or *special*, is made directly to, and in presence of, the Lord Chancellor, or Master of the Rolls. The distinction is, that motions of *course* are *without notice*, and are granted upon being asked for, upon the allegation of counsel, or a certificate or return of an officer. No opposition is allowed to them, but they must be discharged on motion with notice. Special motions are *upon notice*, and *special cause* shewn. Common motions are made at the rising of the court every day in term, on seat days in vacation; or by *petition* to the master of the Rolls, when neither he nor the Lord Chancellor is sitting. Special motions are made also on particular days, or by petition at other times, when the petition is answered by fixing an attendance on the next day of petitions and directing notice to be given. See Newland's Chan. Tit. Motions. Hand's Sol. Ass. 1 to 8. 2 Turner's Practice, 190. Tit. motions, and 1 Harrison.

A great number of motions, which are of course, are stated in Newland's Prac. Tit. Motions.

Hand. Sol.
Am. 3.

Another mode of ascertaining them is, that in special orders, the notice, or attendance of the adverse party is recited. For orders in England, see Equity Drafts. & Hand's Sol. Ass.

The first order for production of books, to bring in an examination, or the serjeant to go, are expressly stated to be orders of course in England; and therefore the analogous order with us to do the act, or shew cause why an attachment should not issue, is also an order of course, and may be entered in the office of the Register, under the 59th rule.

No hardship can possibly arise to the opposite party by this course. His situation is in all respects the same. He has notice before the process can go, and opportunity to object, or procure further time, as the first order is served upon him; and on the other side, there is a manifest grievance by the delay and expense of going twice before the Chancellor in person, for this purpose.

Mr. Blake's book contains a notice to be served by the solicitor for the examinant of the examination being filed with the Master. This seems unnecessary, and not taxable. The caption of the examination contains every thing that is in the notice. Page 239.

It is the course in England, where the defendant resides more than twenty miles from London, to issue a commission to take his examination. This is done upon the certificate of the Master that it is necessary, and a motion of course. A similar course might sometimes be necessary with us, as where the examinant resided in another state. The course is the same as upon a commission to take an answer. The time of return of the commission is fixed by the Master. "Mr. Agar moved for a commission to take the examination of the defendant, stating that the practice of limiting the time by the order, had been altered lately by the Master of the Rolls; who thought the Master the proper judge as to that, Lord Chancellor approved the alteration. It should be made part of the order, that the commission be returned to the Master. In England it is returned to the six clerk.

1 Turner's Pr. 179. and see the certificate Hand's Sol. Ass. 262. and order, *Ibid.* 165.

Hairby v. Emmet, 5 Vesey, 663.

If the plaintiff is dissatisfied with the examination, he may by motion have it referred to a Master to certify as to its sufficiency. It is a motion of course.—"A decree for an account with the usual directions for examining the parties. Interrogatories were settled, and an examination put in with which the Master was satisfied. An order was then obtained referring the examination back to the Master to look into it, and see whether it was sufficient. The Master reporting it sufficient, a general exception was taken, that he ought to have reported it insufficient; not pointing out the parts in which it was so.

Newland, 162. 1 Turner, 180. See order, Eq. Draft. 580. Newl. Prac. Tit. motions.

Purcel v. M'Namara, 12 Vesey, 166.

Master of the Rolls.—The case of *Lucas v. Temple* is an authority for an exception of this sort. As to orders of reference of this description, they are, whether frequent or not, the established practice.

There are many instances of referring examinations to the Master, to look into them, and see whether they are sufficient.

He points out an inconvenience attending this practice of a general exception: that the Master could not know what was the ground on which the court differed from him. He might re-examine the party and decide his re-examination sufficient on the same ground upon which the court had held it insufficient. He thought the better practice would be that resorted to upon a report of costs, viz. by petition, pointing out the grievance, and praying leave to except. He overruled the exception on the merits, and stating that the practice of taking exceptions to

3 Brown's C. C. 32.

these reports was inconvenient and should be discouraged, gave costs beyond the deposit."

2 P. Wms.
181.

Woods v.
Morrel,
1 John. C.
Rep. 105.
1 Fowl. Ex.
Pr. 445.
Equity
Drafts. 567.

The inconvenience of the general exception to a report of the insufficiency of the examination may be avoided, either by requiring the exceptions to the report to particularize the points in which it is insufficient, as is done on excepting to a report of impertinence; or *exceptions* may be taken to the examination at first, instead of referring it on the allegation of insufficiency. Our court would perhaps approve of this course, as it has sanctioned the practice of taking exceptions to an answer on account of impertinence, which is not done in England, the order being of course on the allegation of impertinent matter. It appears to me however, that the course in the English chancery is sufficiently precise, and it certainly is less expensive. The interrogatories have already all the precision of exceptions. All that should be required is, that the exceptions to the report should specify the insufficient parts of the examination. In the Exchequer the practice is to take exceptions to the examination.

Fowl. Exch.]
Pr. 2. 294.

"The examination of a party to interrogatories after hearing is considered in the nature of an answer to a bill before the hearing, and to which exceptions may in like manner be taken, argued or submitted to, as in the case of exceptions taken to insufficient answers."

On a copy of the order being left, a summons issues, underwritten, "to proceed upon the sufficiency of defendant's examination;" and the hearing is continued by adjournment as usual, if the Master does not decide at the first meeting.

See Post. Tit.
answers.

The practice is the same as upon a reference of an answer for insufficiency. No draft issues, nor are objections filed. Exceptions are taken without them.

For the form of a certificate upon this reference, See Appendix, No. 11.

It must specify, as to what interrogatories, or parts of interrogatories, the examination is defective, as is done on a reference of an answer for insufficiency.

Fowl. Exch.
Præ. 2. 294.

If the Master find it sufficient the report is general.

For the form of an examination objecting to answer, See No. 12.

In order to compel a party to put in a better examination, after the report submitted to, or exceptions to it disallowed, a warrant must be taken out requiring him to put in a further examination, and the same steps taken, as to compel a first examination.

By analogy to the mode of limiting the time for filing exceptions to a report upon an answer, the running of this summons would limit the time of excepting to this report ; and the Master should give at least the usual time of four days for that purpose.

See Post. Tit. answers.

The further examination, may be in like manner referred. After three reported insufficient the party will be committed by the court, to remain until he put in a full examination, and pay the costs.

I presume that our court would be guided by the character of the examination, and in a gross case of evasion or concealment, would commit on two insufficient examinations. No rule is established.

The Master must give a certificate of the examination being is, although an order is left with him, referring it, or he considers it insufficient, if he has not reported ; because the party cannot be kept in custody until the sufficiency of the examination shall be ascertained.

An insufficient examination is as none, and if the party has obtained a prior order for the defendant to put in his examination, or shew cause, &c. he may move on the foot of that, for the order to be made absolute, and the attachment to issue.

"An order was made that the defendant should within four days, put in his examination to interrogatories, or the serjeant at arms to go against him.

Bonus v. Flack, 18 Vesey, 287.
Boehm v. De Tastet, 1 Ves. & Bea. 325.
Hill v. Turner, 2 Vesey & Beames, 372.

The defendant put in his examination, which was reported insufficient ; and it was now moved on affidavit of service of the order, and the Master's certificate of insufficiency, that the order be made absolute, and that the serjeant should apprehend him.

Weston v. Lens, 1 Mad. Rep. 527.

It was urged, that such an order was common where an answer was insufficient ; that there was no case where the doctrine had been applied to answers to interrogatories, but the principle must be the same. Motion granted."

4th. The errors which may be committed by the Master, in the course of this proceeding are :

1. The improper refusal to examine a party.
2. The refusal to allow proper interrogatories.
3. The admission of illegal or impertinent interrogatories, or unnecessarily settling any.

The correction of the court is thus obtained.

The Master is given by the decree a discretion to examine parties or not. If he refuse to do it, the course is, to apply to the court by petition for an order.

Ex-parte,
Charter,
2 Cox' Cases,
168.

The following case appears to warrant this practice.

"A reference having been made to a Master to inquire into the petitioning creditor's debt, with liberty to examine parties on interrogatories, if he should think fit, the Master declined examining the petitioning creditor, and made his report without it.

Exceptions were taken; one for not examining the creditor.

Mr. Lloyd objected, that this was not matter of exception, because it was discretionary in the Master to examine or not; that the form was wrong, for in a cause in this court a party cannot except to a Master's report, because he has declined to examine a party, but must move the court upon the circumstances of the case, that the Master be specially directed to examine him. He ought to have applied by petition before the report was made, that the Master might be directed to examine the creditor. But the Lord Chancellor directed the Master to state to the court whether any application had been made to him to examine the creditor, and on what grounds, he had refused so to do."

Although the Lord Chancellor gave the party an opportunity of bringing up the question, and if he was not satisfied with the Masters reasons, would probably have sent the case back to him to review his report, with directions to examine the creditor, yet it is plain he does not sanction the course taken there by exceptions, nor disapprove of that laid down by

(a) Mr. Turner states that to be the practice.
1 Turner,
170.

Mr. Lloyd. (a)

Such practice is preferable because in this, and many other similar cases, it would be the cause of much delay, if the correction of an error which may have important influence upon the report was postponed, until the report was made. Therein is the difference between improperly admitting an examination, and refusing it when proper. In the former, the effect of it is known to the court, and its judgment of the case, when it is rejected, can usually be formed without further inquiry. It may therefore be made the subject of exceptions; but in the latter the effect of the evidence refused cannot be known accurately: the report must be sent back for the Master to hear it, who may make material alterations in his decision in consequence. Such an error should therefore be corrected as early as possible.

It may be proper in some cases, for the Master to give a certificate of his refusal and his reasons, which either party may apply for. If they arise from facts which have passed in his office, as a full admission, or sufficient proof of the matters, it would be more correct that the court should be inform-

ed of these circumstances by the certificate of its officer, than by affidavits of parties. The party is entitled to apply without it, but generally, I apprehend, the court would not grant any order, without calling on the Master.

See 3 Brown.
Ch. Rep.
Hough 7.
Williams,
Bett's Ed. 5th.

The court took this course in *Hough v. Williams*, where the Master had refused to examine witnesses. The order was "that the Master should certify on what grounds he had refused to admit the interrogatories."

3 Br. C. R.
190. note 2.
Belts Ed. 5.

The second error is when the Master refuses to allow proper interrogatories, laid before him.

I know of no direct authority upon this point, but it is one so similar to a refusal to examine a party that the course I conceive should be the same. An application should be made at once by petition with a copy of the allowed and of the rejected interrogatories, for an order to allow them.

In *White v. Lupton*, cited in 12 Vesey, 391. A motion was made for an order that the Master should receive further interrogatories for the defendant's examination relative to certain papers not produced by him under the usual order; the Master being satisfied with the production.

There may be here also such cases as are before stated, in which it would be proper for the parties to get the Master's certificate of the reasons of his rejection.

The next error is the allowance of illegal or impertinent interrogatories.

The decision in *Paxton and Douglass* reviving the course laid down in *Stamford v. Tudor*, prescribes the mode of proceeding in this case. The party answers as he thinks proper. And if the other party is dissatisfied, he must refer the examination; when the objections to the interrogatories, as well as the fulness of the examination, will be considered.

Ante.

5th. EXAMINATION VIVA VOCE.

The decision in *Remsen v. Remsen*, gives the Master the discretion of examining a party upon interrogatories, or *viva voce*. The latter course is generally pursued; and is clearly preferable, where the party may be disposed to evade or prevaricate. The practice before stated may easily be adapted to the oral examination.

This is the only occasion in which a party is orally examined by the present practice of the court. It is stated to have been sometimes done in former times, at the hearing.

"At which time, if any thing shall be found to rest in the defendant's breast that hath not been manifested by proofs,

Remedies
and abuses of
Chancery.
Law Tracts.
441.

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the judge may then examine the defendant in open court, as I have seen the honorable Lord ——— often do, where in face of the court and presence of so many grave and judicious men, more truth has been discovered by a few questions than in three answers penned by a judicious lawyer."

The good sense and convenience upon this practice appears to me to be this. Whenever a particular point is to be examined to, as an obscurity or appearance of fraud in a certain item, or indeed any distinct subject, it is far better to resort to an oral examination. * But if the object is merely to procure the accounts, either the whole, or those since the filing the answer, the other course is preferable. If the interrogatories are settled by the Master without summoning the other party, the delay will be the same in the one case as in the other.

The underwriting of the summons, is, "at which time the ——— is to be examined touching the matters directed to be inquired to, by the above mentioned decree:" or, as to any particular matter the subject of enquiry.

If the Master refuse to issue this summons, which would be equivalent to a refusal to settle any interrogatories, the court should be applied to for an order, that he examine the party; and for the reasons before stated the Master may be applied to for a certificate of his reasons.

If the party neglect to attend, the Master should particularly inspect the proof of service. His certificate of the default is stated, Appendix, No. 13. This form was sanctioned by the chancellor in the case of *Morris v. Sands*, June 1821, after examination.

The Master reduces the examination to writing. The caption of the examination is stated Appendix, No. 14, and the party's oath No. 16. On examining a party, there can be no objection to a leading question, any more than to a leading special interrogatory in a bill.

It must be remembered, that the examinant is entitled to the benefit of advice and counsel in framing his written examination. On an oral one therefore, he may be directed and instructed by counsel as to his answering. So his errors may be amended subsequently, as mistakes in an answer are amended: and with more liberality, the examination being more loose.

And by analogy to the rules as to correcting answers, the original statement, must remain untouched, and the error corrected by a supplemental statement.

If the Master refuse to allow a question, or series of questions to be administered, as going to matters improper or use-

8 Vesey, 79.

10 Ibid. 401.

2 Ves. & Bea.

183. 256.

Fowl's Ex.

Pr. 1. 435.

less to be inquired to, or for other reasons, the questions at large or in substance, or the matter of the inquiry should be stated in writing, and a motion made for an order, that the Master administer those interrogatories, or examine to that point. Either party may take from the Master a certificate of his reasons for the refusal. Simmons v. Gutteridge.

But to questions allowed to be put, the party as before shown, may make such answers as he is advised. If dissatisfactory, the simplest and analogous course would be to reduce the questions to writing, as extended and precise as possible; and also the answers and objections taken, if any. If the answer cannot be formally perfected at the meeting the Master may give time.

It then is in fact an examination in writing, with a trivial variation. By analogy to the English practice, the next step would be an order referring the examination, for insufficiency. But I have no doubt the court would sanction the practice of the Master considering it without an order. It is a delay for which there can be no good reason. If so, either party might take out a summons underwritten, "To consider of the sufficiency of the defendant's examination," in case it was important to have an argument or the party would not consent to an immediate certificate.

See the form of such a certificate. Appendix, No. 17.

If the Master certifies it insufficient, the party may be summoned again, and the underwriting should be, "at which time the — is to be further examined touching the matters, as to which his former examination was insufficient."

Pursuing the analogous rule, the party ought to except to the certificate within the running of this summons. And the Master should allow sufficient time for that purpose. But the course approved of by the Master of the Rolls in *Purcel v. Macnamara*, viz. petitioning for leave to except is so decidedly preferable, that our court would no doubt prescribe it as the practice, if the case should arise.

The party dissatisfied should take a certified copy of the examination from the Master to found his proceedings upon.

See the form of such an examination. Appendix, No. 15.

"If the defendant has in his answer, set out the receipts and payments up to the time of filing his answer, he must in his examination state the subsequent receipts and payments, and carry on the account from that period only by proper introductory words, for although interrogatories may go generally to all sums of money received and paid, yet a repetition in 1 Turner, 320. n. (a.)
M^r Venables,

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the examination of the account comprised in the schedules to the answer might be considered tautologous and impertinent, and referred as such; and if the account ran to any great length, the reference might ultimately be at the costs of the defendant."

The same general rules apply to examinations, as to answers, in relation to their weight as evidence. Where the facts stated are responsive to the interrogatories they are evidence; where they set up other facts, these must be proved *aliunde*. It is only as to the matters inquired about, that the party makes the other a witness, or in the nature of a witness.

CAP. II.

SECTION 4.

CHARGE AND DISCHARGE.

A CHARGE is a statement in writing of the items with which the opposite party should be debited or should account for, or of the claim of the party making it. It is more comprehensive than a *claim*, which implies only the amount due to the person producing it, while this may embrace the whole liabilities of the accounting party.

Thus in prosecuting a Creditor's bill, the charge of the acting plaintiff would contain all the receipts of the Executor and his responsibilities, while that of a Creditor coming in under the decree would include only his own demand.

A charge is peculiarly a statement of sums of money claimed, or to be debited, or of property for which the accounting party is responsible. In the great variety of cases, in which a Master is required to ascertain certain facts, such as the value of an annuity, or of goods at a particular time, the formal paper by which the allegations of either party are put before him, is called a *state of facts*. Although the inquiry may be intended as the ground of a charge upon the party, yet that is subsequently to be determined. The reference is not to charge, but to inquire to a fact. Sometimes they necessarily are combined. See an instance, 2 Newland Pract. 350.

This mode of proceeding by written charge and discharge is recognized in *Remsen v. Remsen*. The learned Counsel (Mr. Riggs) admitted that as a general rule it might be proper, that charges and discharges should be in writing, but it could not be proper that the parties should at their peril,

reduce every thing to writing in the first instance, because in the progress of the account new items might arise.

It is singular that this Gentleman should have fallen into this error. There is nothing to prevent a party bringing before the Master other items of claim, omitted in his charge, whether by mistake, or subsequently disclosed. Every charge concludes with craving leave to add to or alter, as the party may be advised.

I feel great confidence in saying, that every one of experience in the Master's office, is satisfied of the great advantages of pursuing this course; the Solicitor makes himself Master of his whole case, as far as it is possible, at the beginning, instead of acquiring his knowledge, as the investigation proceeds. The Master is greatly aided—precision and accuracy are obtained, and full examination of every point is secured,

Under a decree for an account both parties are actors, and either may proceed before the Master in taking it. The defendant may therefore take out a summons for the plaintiff to bring in his charge, and if neglected, state what he admits against himself, or what appears from the proceedings in the cause, and go on with his own discharge. And in some cases, as bills filed by executors for directions and indemnity, the defendants are necessarily to bring in the charge. For the forms of charges, See Appendix, No. 18. & 19. A charge is taken from the schedules and proofs in the cause, the examination of the defendant if previously examined, or from other sources within the party's power, and to be supported by new proof.

Fowl. Exch.
Pr. 2. 277.

2 Fowler.

Whenever schedules are annexed to an answer containing a statement of the party's receipts, the repetition of them *item by item* in the charge, should not be allowed. It would certainly be sufficient to state generally, that the party should be charged with all the items set forth on such a side of such a schedule to his answer; and then proceed to specify the fresh items. For such a form, See Appendix, No. 18.

This regulation could be enforced by refusing costs for such part of a charge as was a mere repetition of the schedules.

On leaving the charge, a summons is taken out, which by our present practice if the master is to supply the copy may be underwritten,—“*A. B. the above has left his charge,*” or, “*to proceed upon the charge,*” where a copy has been served by the solicitor. Of course the latter is almost always done.

On attending the Master, while the charge is under consideration, the party supports it *item by item*, by shewing the proof, either from the schedules to the answer, examination if any has been taken, or the proofs in the cause; or he exam-

1 Turner,
191.

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CAP. II.

SECTION 6.

WITNESSES.

THIS subject embraces :

1st. When a Master may examine witnesses, and what witnesses.

2. The method of procuring their attendance and taking their testimony.

3. The correction of the Master's errors, in rejecting or admitting their testimony. The first head involves five distinct cases.

1. Where the examination proposed is of a witness not previously examined, to facts not examined to before the hearing.

3 Vesey, 603. It was formerly usual to empower a Master specially to examine witnesses by arming him with a commission in the decree : and in the Exchequer, the course still is to procure such a commission. Now however, the direction in a decree, that certain inquiries be made, is a sufficient authority to the Master to examine new witnesses, to those enquiries.

Fowler's Ex.
Prac. 2. See
also 9 Vesey,
35.

Willan v.
Willan,
Cooper's
Cases, 291.

Lord Chancellor said, " That after publication passed prior to a decree, and the depositions had been seen, it was quite clear that further witnesses could not be examined without leave of the court, which could not be obtained, but with great difficulty, and that to particular facts only. But when a decree directs particular enquiries to be made, the court thereby *in effect* does give leave to examine witnesses as to the subject of the enquiries.

Smith v.
Aldus, 11
Vesey, 564.

" A motion was made that the Master be directed to receive evidence which he had refused. (Which appears to have been evidence taken in the cause but not read at the hearing.)

Mr. Romilly in support said that a notion had got into the Master's office that they could only receive evidence that was read at the hearing, which could not be correct.

Lord Chancellor.—The danger of permitting further examination applies only to a re-examination before a decree, not to an examination before the Master afterwards, the object in directing the enquiry being to obtain further evidence. Where the court directs an enquiry *into a fact* it is in the nature of a new issue joined ; and what would be evidence, in any other case, will be evidence before the Master."

2. The next case is, when the examination is to be of a witness examined prior to the hearing, but to different facts.

A special order is requisite to authorize the Master to take his testimony.

"Some of the witnesses who had been examined in this cause were re-examined before the Master upon different interrogatories, but afterwards the Master conceiving that as these witnesses had been before examined, they ought not to have been re-examined without an order, he directed that an application should be made to the court. The order was granted to authorise the examination."

Greenaway
v. Adams,
12 Vesey, Jr.
360.

"Mansfield moved to suppress the depositions of witnesses, examined before the Master, on the ground, that they had been before examined in the cause, without an order, which was against the practice of the court, whether the examination was to the same point or not. On the other side it was said, the rule only extended to the examination of the same person to the same facts, and could not be meant to include a witness, who might be examined in the cause, only to prove an exhibit, but in fact might be the most material witness upon the merits before the Master."

Vaughan v.
Lloyd, 1
Coxes Cases,
312.

The Lord Chancellor.—The first question is, whether in any case, a witness who has already been examined in the cause, can be again examined before the Master without leave of the court, and this is a dry point of practice. Now if the witness has been examined only to trifling points in the cause, or if in truth he knows more than he has already been examined to, it would most certainly be very hard to prevent the party from having the benefit of his testimony before the Master. But the question is, whether the court has not taken the precaution of making it necessary for the party in that case to apply for leave of the court? which leave it certainly will grant whenever the justice of the case requires it, but will put the party under terms of having the interrogatories approved and settled by the Master, who in so doing will take care that the same witness is not a second time examined to the same facts, not only to prevent the parties being loaded with unnecessary expence, and the cause with useless depositions, but what is a still greater object, to avoid the danger of perjury, which would be incurred by a witness deposing a second time to the the same fact, after having seen where the cause pinched, and how his testimony bore upon it.

Accordingly the depositions of witnesses before the Master who had been previously examined in the cause were suppressed, and the witnesses ordered to be again examined upon interrogatories to be settled by the Master."

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Remsen v.
Remsen, 2
John. C. C.
501.

"No witness in chief, examined before publication, ought to be examined before the Master, without an order for that purpose."

The reasons of the rule requiring a special application to the court, where it is wished to examine the same witness before the Master, certainly do not apply to an examination to different facts; and Lord Thurlow treats the question as a dry point of practice. The Master eventually settles what questions shall be put; what relate to the same matter to which the witness was before examined, and what do not. Why not do this under this general principle, and the rule of the court that he shall settle all interrogatories for the examination of a witness before examined, without the necessity of a special order, which must be granted by the court, almost as of course? I am of opinion our court would establish the practice of allowing the Master to examine the same witness to plainly distinct matters, without an order, if the case was fully brought before it. The language of the 22d rule is however positive that no witness once examined shall be again examined either to the same or different facts, but by order of the court, on sufficient cause shewn. And the following late case shews that the rule is still strictly adhered to in England.

Rule 22.

Smith v. Graham, 2 Swanston, 264.

"J. W. Ready had been examined as a witness under the decree of reference without an order, having been examined in the cause previous to the hearing. It appeared by affidavit that the examination was to different matters. It was moved that his deposition on the second examination be suppressed. Publication had passed.

Lord Chancellor.—The single difficulty in this case arises from the period in which the motion is made, namely, after publication. The fact that the examination is not to the same matters is not an answer to the application. The established practice is founded on this principle, that the court expects to have the judgment of the Master in the first instance on the interrogatories, in order to prevent depositions that may affect the previous statements of the witness. Adopting a rule to avoid the necessity of itself enquiring in every instance, whether the examination is to the same matters, the court, for that purpose, directs the Master to settle the interrogatories.

The depositions were suppressed, without prejudice to an application for the re-examination of the witness. And the following order was afterwards obtained on notice, as it appears.

On this day, Mr. Winthrop moved, that J. W. Ready be examined as a witness on behalf of the plaintiffs, under the said decree, to any matters to which he has not been before examined, and that it be referred to Mr. Courteway, one, and "to settle the interrogatories for that purpose; which upon hearing Mr. Agar of counsel for the defendant, is ordered accordingly."

Sd. Where the examination proposed is of a different witness, to facts examined to before hearing. The cases are contradictory, whether a special order is requisite.

"There was a direction in the decree in this case for the Master to enquire into the value of an estate. Witnesses had been examined, and their evidence communicated to both parties. Afterwards it was conceived that the evidence of another individual, being a tenant of the estate, was necessary to be had upon the subject of its value. A special application was made to examine that individual."

"Motion on behalf of the plaintiff, that the Master might be directed to receive such evidence as the plaintiff proposed to lay before him, by affidavits, or to examine witnesses upon interrogatories before him, in order to repel the claim of the defendant in respect of improvements alleged by him to have been made on the lands in question."

Depositions had been taken before the hearing on the part of the defendant only.

By the decree the Master was directed to enquire whether any lasting improvements had been made by the defendant upon the premises.

A state of facts had been carried in by the plaintiff, and interrogatories left by the Master; but he had written underneath the draft of the interrogatories as follows. "The depositions taken on the part of the defendant, having been published by the examiner, and office copies thereof taken by the Solicitor for the plaintiff, I think I am not authorised to sanction an examination of witnesses, on the part of the plaintiff to the *same matters*; and if the plaintiff is entitled now to examine witnesses, I apprehend the interrogatories are not to be settled by me, without the special order of the Court. J. S. Harvey."

Lord Elden after citing the above case of *Shepherd v. Collyer*, said:—As far as this case goes therefore, it confirms the judgment of the Master; that a special order is necessary.

The application stood over, his Lordship directing that a petition should be presented stating the particular circumstances of the case with dates."

Shepherd v. Collyer, cited by Lord Elden, in *Willan v. Willan*, *Cooper's cases*, 293. from the *Regis. book*.

Willan v. Willan, *Cooper's cases*, 291.

11 Vesey,
665.

On the other side, in *Smith v. Althas*, Lord Eldon said,—
“As to the examination before the Master of those witnesses, who were examined in the cause, there must be an application for leave to examine them, but as to persons who were not witnesses in the cause, they may be examined before the Master to the same points.”

Hough v.
Williams, 3
Bro. C. C.
190.
See Bell's
Edit. & note.

“Bill to set aside securities obtained from the plaintiff by the defendant.

The bill charged that the articles, for which the securities were given, were sold at prices far beyond their real value, and stated the loss sustained by each particular sale, and the plaintiff *had given evidence* of this, but the defendant had entered into no proof as to it. Mr. J. Buller, sitting for the Lord Chancellor, had made a decree, that the Master should take an account of what the articles were really worth at the times of their respective sales, and that the securities should stand for so much only as was reported. Upon the reference, the defendant offered to exhibit interrogatories for the examination of witnesses to prove the real value; but the Master refused to receive them, on the ground that the point *had been expressly put in issue in the cause*, and the defendant might therefore have examined witnesses to this point in the cause.

It was moved on the part of the defendant, that the Master might be directed to receive these interrogatories.

And the Lord Chancellor, said,—He could not conceive how the Master could doubt about it; for the decree implied, that the Master was to receive evidence as to the value, and directed the Master to certify the reasons on which he refused to receive the interrogatories.”

Ante.

Transposing the plaintiff and defendant, this case is precisely that of *Willan v. Willan*, and the decisions are directly at variance.

It appears to me that those cases of *Willan v. Willan*, and *Shepherd v. Collyer* give the proper rule for the government of the Master, and render a special order requisite. The leading principle of the court in the examination of witnesses is, that no part of testimony should be disclosed till the whole is taken; that the parties may not have the advantage of knowing the evidence of their own or their adversary's witnesses, to amend or meet it. So long as the court abides by this doctrine, it cannot allow a rule, which would completely defeat it in every case, which must go eventually before a Master. The court may under special circumstances, admit of the examination, but the Master without its direction, cannot. Nor does the direction of a decree to take an account of the val-

ne of articles appear to me sufficient authority, or the reasons of the Lord Chancellor very satisfactory. These matters are sent to the Master, merely from the habit of the court of relieving itself from the labour of making estimates or computations ; whether these can be made from the evidence already before the court, or that further testimony is requisite. In *Hough v. Williams*, for instance, the decree to take an account of the value of the articles, was a matter of course, and would have been made, if all possible testimony from both parties, had been before the court. I do not see therefore the force of the argument, that by a direction to make enquiries as to value where some materials of judging are given by the testimony, the permission to take further testimony is implied. It is probably on account of this difficulty that clauses are frequent in decrees, that the Master take such further evidence upon the matters as either party may produce.

There are some obvious principles applicable to this point which would influence the court in allowing or refusing such an examination. Suppose a party in possession of an estate under a contract, giving him various items of allowances, and prohibiting others—that he is called to an account of the value of articles appropriated in violation of the contract. If these matters were distinctly put in issue in the pleadings, and one party had fully and minutely examined to them before hearing, and the other neglected it, ought he to be permitted to examine to them subsequently ? This would be giving great opportunities for the fabrication of testimony, or the tampering with witnesses.

There is another class of cases, viz. those in which the fact has been touched upon in the interrogatories and depositions, but in so slight or imperfect a manner, that the testimony cannot afford a ground of conclusion. The party who has examined may not have exhausted his witnesses, and the advantage to the opposite party is therefore less. In such cases the court would be inclined to allow the subsequent examination. So the matter may be a plain naked fact on which there can be no nicety of evidence, but a positive and distinct answer can be given. But all these considerations shew that the subject is more fit for the determination of the court, than the Master. The former can best decide, from the state of the pleadings, the fulness or nature of the testimony, and the character of the enquiry, whether a further examination to the same matters shall be permitted.

4th. The fourth case is, where the proposed witness has been examined before the hearing, and to the same facts to which his testimony is required to be taken by the Master.

Maddocks, 1. 392. It is said generally in the books, that the witness cannot be examined to the same facts to which he had been before examined, and that this is made part of the order.

Dickens, 508. The latter clause rests upon the decree of Lord Bathurst in *Browning v. Barker*, who on a special motion to examine a witness, examined previous to the hearing, made it part of his order, "that the witnesses were not to be examined to any matter, which they had before been examined to." I think however, that Lord Thurlow, with his usual discrimination on points of practice, has pointed out the true distinction in this case, and properly qualified the generality of this language.

1 Coxe's
Cases, 312.

In *Vaughan v. Lloyd*, as before stated, the witnesses had been examined before the Master to different facts, from those they were examined to before the hearing; and the depositions were suppressed. Lord Chancellor added,—“Let the witnesses be examined again upon interrogatories, to be settled by the Master; but I will not insert in the order any direction that they shall not be examined on the same points, for that the Master will take care of. Such a direction was inserted in the order in *Browning v. Barker*, but I much doubt whether it was proper. Suppose the witness had been examined in the cause on a more general interrogatory, under which he might have deposed to the point required, but did not; and a more particular interrogatory was exhibited to get at his testimony; I should think the Master would do right in admitting it. The matter is therefore to be judged of by the Master, and if his judgment is erroneous, you may then come here to have it rectified.”

Birck v.
Walker, 2
Sch. and
Lefroy, 518.

“If a witness has been examined in chief in a cause, he cannot be examined again to the account before the Master, without special order, and the interrogatories being settled by the Master, to prevent his being examined to the same matters, to which he has been examined in, chief. If he has merely been examined as a witness to a deed or some such matter, the interrogatories need not be settled by the Master, as it is evident then, that he is not to be examined to the same matter.”

Anon. 2 Ch.
Cases, 79.

5th. The fifth case is an examination by a Master of a witness who has been once examined before him.

“The Master examined one witness three times to the matter of account.

Ordered that the depositions be suppressed.”

Remsen v.
Remsen, 2.
John. C. C.
501.

“A witness once examined before the Master, cannot be re-examined without an order.”

The Chancellor cites, 2 Maddocks, 392. & 2 Vesey, Sin. 270. Mr. Maddocks cites 2 Vesey, 270 only.

That is the case of *Cowslade v. Cornish*, cited before ; under title of *Cornish v. Acton*, from 2 Dickens. Lord Hardwicke there, after saying that the Master might examine a defendant as often as he chose, and a new order was not necessary, added,—“ It is so indeed in case of a witness ; for that is different. If a witness is once examined, it might be dangerous without an order, to let him be examined again ; but that is from the danger of drawing in a witness, when it is known, what he has sworn to.”

In this case also the rule ought to be understood with the qualification that the Master is only precluded from re-examining to the same facts once deposed to, without an order.

The case in 2 Chan. Cases, appears to have been a re-examination to the same facts. Lord Hardwicke must have meant such an examination from the reason he gives ; and so it is understood by Chancellor Kent, who says in a subsequent passage,—“ An order seems to be requisite when a witness once examined, is sought to be again examined before the Master on the same matter.”

2. The second subject of consideration is, the mode of procuring the testimony of witnesses ; comprising :

1. The mode of bringing them to an examination.
2. The manner of taking that examination.

The first head varies in three different cases.

1. Where the witness resides within the county where his testimony is to be taken.
2. Where in a different county of the State.
3. Where in another State, or a foreign country.

1. It is a usual practice of our Masters to issue a summons in the nature of a subpoena, requiring the witness to appear and testify what he knows in the matters in reference, &c. This is signed by the Master.

Undoubtedly however, an attachment could not be supported against a witness disobeying this summons. It is a principle to which I know but one exception, (a subpoena from the sessions,) that a party shall not be brought before a court, but by writ under seal.

By the Constitution all *writs* must run in the name of the people of the state of New York, and be tested in the name of the Chancellor or chief Judge. Art. 31.

By statute all *writs* and *process* of the Court of Chancery, 1 R. L. 487. shall be sealed with one of the seals.

One exception to the general rule is made by statute, providing that no seal is requisite on a subpoena from the general sessions of the peace, but that it may be signed by the prosecuting officer; and thus confirming the necessity of a seal in every other case.

Rule 21.

Upon issuing a commission to examine witnesses, a *subpoena* is taken out, and a memorandum signed by the commissioners is left with the witness. When it is to bring a witness before the examiner, the day and place is specified in the writ.

The party is indeed brought before a Master by a summons, and may on application be committed for default; but this is by the unexpired force of the original *subpoena* to appear and answer, by which, being brought into court to do and receive what it shall consider in that behalf, he contemns that original command as much, by neglecting to appear before the Master, pursuant to the order of the court, as if he had disobeyed it in the first instance.

A witness is not bound to attend upon a commissioner's summons, and that of a Master is not of higher authority.

Wardel v.
Dent,
Dickens,
334.

"Phipps and others, being served with a commissioners summons to attend and be examined, neglected it; whereupon an order nisi was obtained that they should attend at their own expence before the Examiner and be examined. On their shewing for cause, that they had not been served with a *subpoena ad testificandum*, but only with a summons, Lord Hardwicke discharged the order."

Hind's Pract.
337.

"No process of contempt lies upon disobedience of the Commissioners summons, no writ *under seal* being directed to the witness."

Rule 21.

The form of the *subpoena* used by the clerk in New York is given in the Appendix, No. 22. It is framed by analogy to that used to bring the witness before the examiner, specifying the time and place in the writ. And the form of the ticket left with the witness on the service is also given.

There can be no doubt, that where the Master resided in a distant county, the court would sanction a *subpoena*, framed like that used on a commission under the 21. rule, requiring the witness to attend at such time and place as the Master should appoint, and leaving the names blank. A memorandum in writing of the time and place, signed by the Master, should be left with the witness, and the writ shewn to him.

If the witness refuse or neglect to attend, or be examined, the court must be applied to.

"A witness who had been served with a *subpoena ad testificandum*, ordered to attend and be sworn in four days and be examined, or to stand committed." Osman v. Fitzroy, Dickens, 60.

2. Where the witness resides in a different county of the state.

There is no doubt that a witness may be brought by a subpoena from any part of the state to any other part, and from the preference of the profession for an oral examination, this course is frequently taken. But there is another practice which in many cases it would be convenient, or even necessary to pursue.

The English course is, if the witness resides more than twenty miles from London, to procure a certificate from the Master of the necessity of a commission to examine him, and on motion the commission will be granted. 1 Turner's Pract. 210. Hand's Sol. Ass. 252.

This certificate should be founded upon some proof of the residence of the witnesses. The form is given, Appendix, No. 24.

The court pays much respect to this certificate, and will not grant a commission without it.

"The plaintiff moved as *of course* for a commission to examine witnesses in the country, and the order was made. It was now moved to discharge that order for irregularity; having been obtained without a certificate from the Master of the necessity of such a commission. Beacroft v. Berkeley, 2 Cox's Cases, 108.

The two Masters (sitting with Mr. J. Buller) present agreed, that it was the constant practice to obtain such a certificate before such an application was made; and Mr. J. Buller said it seemed to him a very reasonable rule, for when the court has sent a reference to a Master, if the Master finds from any thing that passes in his office, that such an examination is necessary, it seems very fit that he should certify that to the court; without which it would be impossible for the court to know what had happened since the first reference, that made any further examination necessary; besides which, if it were at the ~~option~~ of a party to obtain such a commission at pleasure, it would obviously be the instrument of great delay and evasion of justice.—And discharged the former order." option

An order upon this is entered of course, for the commission to issue. If the opposite party would prevent it, he must move to discharge that order. See the order Hand's Sol. Ass. 136. Chaffern v. Wells, Dickens, 377.

"On a motion to discharge an order for a commission to examine witnesses, founded upon a Master's certificate, the question was whether this was the correct course, or exceptions

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should be taken to the certificate. Lord Hardwicke held the motion was the proper mode."

I conceive that this practice might properly be pursued here and in such case, the practice upon the commission will be precisely that under the general rules, 21. & 24.

By the act of the 45 Session, Cap. 272. a commission may be issued to a sole commissioner upon petition of the party, naming the person to be appointed, and upon notice to the opposite party to shew cause against such appointment, the clerks are authorized to direct such commission to be issued under such rules as the Chancellor may prescribe.

When a commission issues, it would save some expense to make it part of the order, that it be returned to the Master's office.

The Chancellor has allowed a practice in a particular case, which it seems, if made a general rule with a few additions, would afford a convenient and judicious course.

Mason v.
Roosevelt, 3
John. C. C.
627.

"J. Emott on an affidavit, that witnesses were aged, and could not without expence and trouble be taken before the Master, who resided in a distant part of the state, on a reference before him, moved for leave to take their examinations before a Master in the County where the witnesses resided. The Court granted the motion and ordered, that these witnesses be examined before a Master in the County in which they reside on interrogatories to be approved by the Master before whom the reference is pending, and on giving such notice as the said Master may direct."

The course prescribed by this decision might be adopted in all cases, where witnesses to be examined reside in another part of the state, and the parties consent, or the Master directs that they should be examined there. A general rule might empower the Masters to examine such witnesses as should be produced to them, upon a certificate from the Master to whom the cause was referred, of such examination being requisite. If the examination is to be upon Interrogatories, they should be laid before the Master, a copy served, and a time limited by a summons for exhibiting cross interrogatories; both of which the Master should make up with his certificate, and the party applying for the examination should have the carriage.

If there is no master in or near the county in which the witnesses reside, of course a commissioner must be employed, and the rule might provide that in such case the commission should go to a person agreed upon by the parties, or chosen by the master, and to be named in his certificate.

The practice before the Master taking the examination would be analogous to that upon the execution of a Commission.

The Commissioners appoint a time for taking the testimony, of which notice must be given.

By the English rule this notice is for 14 days, and is signed by the Commissioners. There is a label annexed to the Commission, specifying the parties to whom notice is to be given.

1 Harr. 312.
Hind's Pr.
334. 1 Harr.
309. 313.

If a Master was employed to examine, his summons fixing the day of taking the testimony would be proper; and the party to whom notice of the execution should be given might be named in the certificate of the Master to whom the cause was referred. Thus the opposite party would have the power of having an agent present at the examination, if he thought proper, by naming him to the Master. The witnesses may be brought before the Commissioners by a subpoena with the names, and time and place of attendance left in blank under the 21 rule, and undoubtedly the Court would sanction a similar subpoena, where a Master was to examine.

See English
Subpoena,
Hind's Prac.
339.

The Master being a sworn officer need not take an oath before taking the testimony. The commission is returned to the office of the clerk issuing it. It should be provided that the depositions be returned to the Master granting the certificate.

The mode of taking the depositions, and other formalities to be observed, should be as nearly as possible, the same as upon a commission: for minute directions upon which, See Harrison, Tit. Examination of witnesses. Hind's Prac. page 334. et seq. and Clerks Assistant. Tit. Commission.

Examinations by a Master, rather than by commissioners, was contended for as long ago as in the time of Sir Thomas Egerton.

"Adde hereunto, that it would be dispatched with greater skill and greater Soreietie by the Masters having much exercise and Learninge, and being not affectionate to the parties, than it can bee by the usual commissioners, being for the most part unlearned, unexpert, apt to be circumvented by some craftie associate of theirs, and ever affectionate to one of the parties, and as I thinke with less charge to the parties also."

Masters in
Chancerie,
apud. Law
Tracts, 304.

3. When the witness resides in a different state, or in a foreign country.

The Master gives a certificate, that it is necessary a commission should issue, upon which the party moves the court

Newland,
169.

for a commission, the same as where the witnesses reside in the country.

Hand's Sol.
Ass. 94.

It is a motion of course ; and therefore the order may be entered at the register's office upon the certificate ; and the adverse party must move to discharge it.

The Master must be governed by the same rules in granting his certificate that the court is, in allowing a commission to issue on an application before hearing.

The following are the cases from which these rules can be extracted.

Anon. 1 Ve-
non, 334.
1685.

" Lord Chancellor declared, that the *general* affidavit of having *material witnesses* beyond *sea*, should not be sufficient for a *new* commission. But the witnesses must be named in the affidavit, and the point mentioned to which they can materially depose."

Oldham v.
Carleton, 4
B. C. C. 88.
1792.

" Motion for a commission to examine witnesses in Bermuda upon the usual affidavit, that the plaintiff is advised it will be necessary to examine witnesses in the cause, particularly to examine W. Smith, resident in Bermuda, without whose testimony he cannot safely bring the cause to a hearing. Opposed on the ground that it should be shewn on what points the testimony was material. Either in the pleadings or the affidavit the grounds should be stated.

It was answered, that it was sufficient to state the witnesses name ; that his testimony was material, and that he was abroad ; otherwise it would be tying down the witness to the matter stated, and so material evidence might be precluded.

And the registrar being of this opinion, the motion was granted by Commissioners, Eyre and Ashurst."

Harrison's
Chan. Ist.
335.
Phil. Edit.
1806. See
Hind's
Pr. 305. 309.
2 Newl. Pr.
259.
Page 305.

" In order to obtain a commission to examine witnesses abroad, an affidavit must be prepared, stating that the plaintiff or defendant is advised it will be necessary to examine witnesses in the cause, also stating the *name* and residence of the witness abroad, and that without his testimony the party is advised and believes he cannot bring the cause to a hearing."

In Hind's Practice it is stated, that the order is obtained upon an affidavit stating that some of the witnesses whose evidence will be material, and whom it will be necessary to examine on the behalf of the party applying reside at the place abroad, and that the party cannot proceed to the hearing without the testimony of these witnesses. He does not state that the names must be expressed in the affidavit.

1 Newland,
250.

Mr. Newland states that it is not necessary to state the names.

Motion for a commission to examine witnesses at Hamburg, as to the damage of a cargo by the vessel bulging on the voyage. Opposed on the ground that it was denied the vessel had bulged, and that the names ought to be mentioned, and the points to which they meant to examine. 7 Vesey, 304.
Rougement
v. Royal
Exch. Ass.
Comp.

Sir J. Romilly in reply, said, it was necessary to examine witnesses at Hamburg to the fact of the damage of the cargo; but upon such a motion, the subject arising abroad, an affidavit was not necessary, and *Oldham v. Carleton* determined, that the points to which the examination is intended need not be stated. The court made the order."

The statute of this state requires that the names of the witnesses should be inserted in the commission. This does not however extend to the court of chancery; which had power to award a commission before the act. The terms used are, "If any material witness in any action, in any court of record shall not reside in this state." 1 R. Law.

It was clearly recognized by the Chancellor in the case of *Dale v. Roosevelt*, that the statute was not binding upon the Court of Chancery, though its forms should be generally observed. In fact these forms are chiefly taken from the old rules observed in that court, as will be seen by an examination of Harrison's Practice. 1821.
See 2 Fowler,
Ex. Fr. 94.

It seems that the party should swear in his affidavit to a cause of action or merits of defence.

"The point in the cause was, whether a second legacy given to the plaintiff, by a second codicil of the same sum was intended to be augmentative? The party applied for a foreign commission. The affidavit stated the point to be examined to, and the witnesses' names.—And Lord Thurlow held the plaintiff ought also to have sworn to her cause of action, her belief that the second legacy was meant to be augmentative." 1 Br. C. C.
448. 1785.
Coote v.
Coote.

See a form of the affidavit in 2 Turner 25. including all these points.

This is the rule at law—"Where a party asks for delay, he ought to state positively, that he has a defence on the merits, and that he seeks only the requisite proof." 2 John. Cases, 283.
Franklin v.
Un. Ins.
Comp.

There is an authority, that if the court think from the circumstances of the case, that there is probable cause for a commission going, it will grant it without an affidavit.

"Duport residing in England was owner of a plantation in St. Christophers, where Jessup resided. Jessup, by an agent in England entered into a contract with Duport for a lease of the premises upon certain provisions. Barnardiston's
Reports, 192.
Jessup v.
Duport.

The bill prayed a specific performance. The defendant insisted the contract was void under some of those provisions.

The plaintiff's solicitor preferred a petition at the rolls, for leave to have a commission to examine his witnesses at St. Christophers; and to this an affidavit of the solicitor was annexed, that *such commission was necessary*.

An order was granted, and on motion before Lord Hardwicke to discharge it, he said,—“It ought not to be discharged. The ground for granting a commission beyond sea to examine witnesses must depend upon the special circumstances of the case; those circumstances may be disclosed upon affidavit, or else they may arise from the nature of the case itself. Had the matter rested merely upon the affidavit, it would not have been sufficient, because it did not state the reasons why a commission was necessary. But these are circumstances, arising from the nature of the transaction, by which it does appear that such a commission is necessary.

The performance of an agreement rests upon circumstances in the discretion of the court, and many of these arose *beyond sea*. As on the one hand, it must not be laid down, that the granting such commission is a motion of course, so on the other, it must not be laid down, that the party applying for it must shew an absolute necessity for it: for in that case on motion to this court, the court would determine the merits of the cause. Whereas it is sufficient to shew that there is probable cause for the granting such a commission.”

I conceive that the true conclusion from the cases is, that the court will as a general rule require in the affidavit the names of the witnesses, and that their evidence is material to the matters in controversy. But the name is not essential, and the commission may issue without it. This sometimes would be convenient, as where the witness is such, by virtue of a public office, as keeper of records, and his name is unknown. But it cannot be sufficient reason for issuing a Commission, that the circumstances occurred in the place to which it is to go, and therefore they may most probably be proven there. They may have arisen abroad, and yet the proof exist here. It certainly should be required, that the parties should swear that the proof exists there, or at least that it does not exist here.

The following late case appears to me to contain the just rule upon this point. Bill for a commission to examine witnesses at *Riga, Lubec, & Hamburgh*, and elsewhere beyond seas, for leave to use the depositions on a trial at law, and an injunction in the mean time.

The affidavit in support of the motion for a commission, stated, a consignment from *M. J. H.* to the plaintiff of a quantity

of linseed, for sale. It stated the barrels were such as were generally used, the official brand upon them denoting it to be seed of the growth of 1816. It stated also various certificates to that effect upon its shipment at *Riga* and re-shipment at *Lubec* and *Hamburg*, and that it had not been altered; that it was bought by defendant as seed of 1816; that he afterwards alleged it did not prove to be such seed, and applied for an allowance, and commenced his action for damages, on the ground of its not being the crop of 1816, but of bad quality, &c.—That defendant refused to consent to a commission; and that the plaintiffs were advised, that they could not safely proceed to trial without the testimony of persons resident in *Riga*, *Lubec*, & *Hamburg*, or elsewhere abroad; and that they had reason to expect and believe that they should procure, if they were allowed a commission for that purpose, such evidence as would enable them to make a good defence. The order was that one or more commission, or commissions issue for the examination of the plaintiff's witnesses at *Riga*, *Lubec*, and *Hamburg*, returnable without delay.

“In returning a commission sent beyond seas, when it is apprehended that the returning thereof by a commissioner, or by some person that can make affidavit of the true keeping of it will be too much delayed, the court has sometimes ordered that it be delivered to a Master to be sent by post and that he receive the same back by the post, when executed.”

Compleat
Chancery
Practiser,
2. 495.

For the form of an order for a commission, see *Hand's Sol. Ass.* 94, 95. and of the commission, see *Hind's Pract.* 309. 2. *Fowler's Exch. Pr.* 77. 2 *Newland's Pr.* 281. In all which the form is to *examine all witnesses*, or *all witnesses whatsoever*.

Mr. Eden cites the case of *Barthend v. Cousins* from 2 *Fowler Ex. Pr.* 64, which however I cannot find in the editions of 1795, as deciding that upon this motion it is necessary that *some witness* whom it is intended to examine, should be named; unless the party moving is plaintiff both at law and equity, and therefore moving in his own delay.

On injunction
64.

□ The second branch of this subject is the manner of taking the testimony of witnesses. Upon this topic, the practice in our state, and the doctrine of our court are entirely different from the English rules.

In England the *viva voce* examination of witnesses never takes place without a special order of the court; and it is also to be deduced, though nowhere clearly stated, that the examination is secret. In consequence of an order of Lord Clarendon which did not appear to have been expressly vacated, a

3 Vesey, 603. question was made in the case of *Parkinson v. Ingraham*, whether the Master had the power of examining witnesses at all; whether the interrogatories must not be filed with the examiner.

An order in the time of King James was produced, recognizing the right of the Master to examine, and forbidding his clerk to do it. The Master of the Rolls entered at large upon the subject, and shewed that the court in former times, after Lord Clarendon's order, had been in the habit of inserting in the decree a commission to the Master to examine witnesses. He also stated he had found many orders ^{superseding} depositions taken before a Master, and that the practice had undoubtedly prevailed of Masters examining, which he considered the court had sanctioned. The Lord Chancellor also said, that it was quite settled, that the Master, whenever any subject occurs, in which he wishes to have the examination of a witness, takes the examination.

1 Turn.
Prac. 170.
Ibid. 196.
1816.

Mr. Turner states "that it is laid down that the Master may examine witnesses, and that he did so, and that it was formerly the course of the court for the Master to examine upon matters depending in his office, and that if he thinks fit, he may do so now after a decree. But the Master rarely exercises this authority. In *Lucas v. Temple* the Master to whom the cause was referred took upon himself the examination of the witnesses, the only modern instance of such a proceeding for a considerable length of time, and the course of practice is to file interrogatories as in other cases at the examiner's office for the examination of witnesses in town."

M. 299.

In another passage he also states, "that interrogatories for the examination of witnesses must be settled and signed by counsel, and left with one of the examiners to examine the witnesses in town, and he afterwards delivers out copies of the depositions to the solicitors in the cause, who require them, and publication is enlarged, or passes, by warrants taken out of the Master's office. And a late case clearly settles that the examination by an examiner's after decree is now practised. The decree in this cause directed a reference to the Master to take certain accounts, and the plaintiffs having carried in two states of facts charging the defendants with the receipt of various sums of money, *J. W. Ready* was examined *before one of the examiners, as a witness* in support of the charges, without an order obtained for that purpose, although he had been examined as a witness in the cause previous to the hearing.

Smith v.
Graham,
2 Swanston,
264.

In the Exchequer a commission issues; when required, to the Master, empowering him to examine witnesses separately, upon their corporal oaths to be taken before him; See Fowle's
Exch. Fr. 2
285.

In Ireland it is stated to be the rule, "that the officer is not to examine any witnesses on the account *viva voce*, unless by consent of the parties, and the consent and examination are to be entered in his book of references." Howard's Eq.
side, 1. 35.

Speaking of the examination of witnesses after decree, it is said, "that in this case the chief remembrancer or his deputy, not the examiner of the court, is to examine the witnesses; and the depositions taken upon this examination, are published of course without any order of court for that purpose." Ibid, Page 81.

It is stated in all the books of practice, that the counsel settle interrogatories for the examination of witnesses.

The statement of Mr. Turner is no doubt correct, as to the practice generally; but it is clear that the Masters have the power of examining, and it is singular that the court should not compel them to exercise it. The great advantages of an examination by the person who is to judge upon the testimony, are apparent.

There can be no doubt that the examination before the Master whenever used is secret, because that before the examiner is so. A deviation so great from the usual mode would certainly be noticed in the books of practice. Turner, p.
207.

An open and oral examination has however been the practice of our court as long as its rules can be traced. And in the case of *Remsen v. Remsen* it has been deliberately sanctioned: The Chancellor there establishes that the requisite proofs should be taken on written interrogatories, prepared by the parties, and approved by the Master, or by *viva voce* examination, as the parties shall deem most expedient, or the Master shall think proper to direct in the given case; that the testimony may be taken in the presence of the parties or their counsel. 1 Johns. C.
R. 498.

It has also been the invariable practice in our state for the Master to exercise the right of admitting or rejecting witnesses proposed, and of over-ruling questions. From the mode of the examination in England, this right cannot be exercised by the Masters there. If the general course of practice is pursued, of examining before the examiner, as the counsel prepare the interrogatories, the Master cannot know of any objections to them or to the witnesses, until the depositions have been published and brought before him. And even where he examines the witnesses himself, as he does it privately, he would probably put the questions, however impro-

per they may appear, and let the objection to be made to them upon reading the evidence on the argument before him, or put the party to a motion to suppress the depositions. As by our method however, the objection can be taken and argued at once, as upon a trial at *nisi prius*, it has become the uniform practice to contest all questions upon the admission of evidence, before the Master, and for him to decide them.

In case written interrogatories are resorted to, the same right seems to belong to the Master. The Chancellor states that the proofs are to be taken on written interrogatories, prepared by the parties, and *approved* by the Master, or by *viva voce* examination, &c. And as the interrogatories are to be exhibited by the Master, and in presence of the parties, there does not seem any good reason for denying the power in this case, which he possesses in the case of an oral examination.

Of course a Master will be scrupulous of rejecting testimony, and will only do so in a clear case. Less inconvenience will certainly result from receiving evidence which may prove illegal, than from rejecting that which may be proper.

For the forms of the oaths to be administered to witnesses, See Appendix, No. 23. And of the caption, &c. of depositions, No. 25, 26.

3d. The third general head upon the subject of witnesses, is, the method of correcting the Master's errors in admitting or rejecting testimony.

1. If the Master refuse to receive evidence or examine a witness, a motion should be made immediately for an order to compel him.

It is true there is a case before Lord Hardwicke at variance with this position.

3 A+k. 524.
Anon.

"On an account before a Master, the plaintiff offered to read depositions in a former cause between the same parties which the Master refused without an order. It was now moved for. But the Lord Chancellor denied it, saying he would not put parties to unnecessary expense by such applications. The reason such evidence cannot be read at the hearing without an order is, that every cause before the court is an entire proceeding, and determined for the most part in one day; but before the Master, parties go on *de die in diem*; and he has an opportunity of judging whether he ought to admit the depositions to be read, or, if the Master should be mistaken, exceptions may be taken, and therefore there is no occasion for the court to make an order in it."

But there are many instances of such motions being made, and orders granted upon them. Thus in *Smith v. Aldus*, a motion was made that the Master should receive evidence taken in the cause, but not read at the hearing, which he had refused; and an order was granted. 11 Vesey, 564.

So in *Willan v. Willan*, and *Hough v. Williams*, and in *Redifer v. Obrien*, the Vice Chancellor said,—“If the Master refuse to receive the additional evidence, a distinct motion may be made that he should be ordered to receive it.” Cooper's Cases, 291.
3 Br. C. C. 190. Ante.
3 Mad. Rep. 43.

It appears to me clear, that in general the expense and delay will be much less by resorting to a motion immediately. The rejected evidence will probably be such as will materially affect the report, and if an exception is taken and allowed, the case must be sent back to the Master to receive it, and his report again brought before the court. If a motion is made and denied, the delay will be trifling, if any, and the costs fall upon the party causing it.

In *Hough v. Williams*, where the Master refused to receive interrogatories for the examination of witnesses, the court made an order, that he should certify on what ground he had refused to admit them. 3 Br. C. R. 190. Belt's Edn. note.

The Master may give such a certificate at once without such an order at the request of either party.

2. The second case is where the Master admits illegal testimony.

This may be corrected by motion to suppress the depositions, or not to consider such evidence.

“I have looked into the book which Mr. Deaves has made of such points of practice as he deemed worthy of being preserved. It contains innumerable orders for the suppression of depositions of witnesses before the Master.” Such a motion was made in *Vaughan v. Lloyd*. For Master of the Rolls, in Parkinson v. Ingraham, 3 Vesey, 603.
1 Coxes Cases, 312.

It has been held that exceptions for the improper admission of testimony will not lie.

“The plaintiff examined a witness before hearing who was interested and her deposition was refused. Under a decree for an account, she was examined before the Master to the same matter, having released, without an order. On exceptions to the report, and offering to read the deposition, it was objected, that she was not a good witness, her oath when interested being a chain upon her, and that no witness ought to be examined twice to the same matter, without special order, to which it was answered, that the defendant ought then to have moved to suppress the deposition for want of an order, but could not object it when the deposition came to be read.” Callow v. Mince, Prec. in Ch. 254.

My Lord Keeper was of opinion for the plaintiff in both."

There have however been instances in our court of exceptions to the report taken on the ground of the improper admission of testimony. And perhaps there is a class of such cases in which the court would not disapprove of the objection being made at the hearing, whether in the form of an exception or motion to suppress the deposition. Such would be cases where the witness is inherently incompetent, and cannot be made good, as a wife for or against her husband, or where the competency is a legal question merely, as of a guardian *ad litem*. And in such a case the evidence or the reasons and evidence on which the Master proceeds, ought to appear, that the court may see how the rejection of the testimony affects the report. But where the objection is merely technical, as an examination without an order of a witness before examined, the court would not suffer the party to wait until the hearing, to make the objection. It would look at the contents of the deposition.

3. Where the witness himself objects to testify, the course to be taken is not pointed out in any case of which I am aware.

As the Master in England examines the witness upon written interrogatories, I presume that the practice in this particular would be similar to that before the examiner; and our own may be the same, or adapted to it, according to the principles of our court.

The following cases shew that practice.

Mosely, 228.

"In *Nightingale v. Dodd*, it was stated by the Lord Chancellor that a witness may demur for matters *dehors* the interrogatory, because he has no other way to relieve himself, but by demurrer; but then the facts must be verified by affidavit."

2 Ch. cases, 208.

"The case of *Jefferson v. Dawson*, is referred to, in which it is stated, that a witness demurred to interrogatories, because she claimed an interest in the land, and disallowed, because she did not swear to the interest, nor what interest she claimed."

3 Atk. 524.

"In *Vaillant v. Bodemead*, a demurrer was taken by a witness in the following form, "for that he knew nothing of the matters inquired of by the interrogatories, besides what came to his knowledge, as clerk in court or agent of the defendant in relation to the matters in question in the cause, and therefore submitted whether he should be obliged to answer thereto."—Lord Hardwicke said, that these demurrers ought to be held to very strict rules; that they ought to state that the witness knew nothing but by the information of the client. That it

appeared in the case, that the matters inquired after by the interrogatories were antecedent transactions to the commencement of the suit, the knowledge whereof could not come to the witness as *clerk in court or solicitor*. That an agent was not protected, but only persons of the profession. And overruled the demurrer."

In *Parkhurst v. Lowten*, a demurrer to interrogatories put in by a witness before commissioners, was set down to be argued as demurrers to bills. 3 Mad. Rep. 121.

The Vice Chancellor ordered it to be struck out of the paper, as not being properly set down among demurrers; and a special motion was then made that the demurrer might be overruled, that a new commission might issue, and the witness be ordered to attend, and submit himself to be examined upon the interrogatories demurred to. The motion was made on the ground that the interrogatories clearly shewed, that an answer to them would not be divulging clients' secrets.—But it was refused."

Afterwards on an appeal, the Lord Chancellor held that such demurrers ought to be set down to be argued like other demurrers, and ordered the demurrer to be overruled, declaring the reasons assigned by the witnesses were not sufficient to sustain it."

Note (s) to
Morgan v.
Shaw, 4
Mad. Rep.
54.

And the course of setting down the demurrer to be argued was pursued in the subsequent case of *Morgan v. Shaw*. 4 Madd. Rep. 55.

"The Vice Chancellor there said, that when the case of *Parkhurst v. Lowten* was before him, he was not aware that a demurrer of this nature, was, in effect, an answer put in upon oath, by which the party swears that he cannot answer to the question stated without a breach of the privilege of his client; a further affidavit was therefore unnecessary, for if his situation be not truly such as he represented it, he would be indictable for perjury; that in equity his oath in the demurrer, that the question cannot be answered without a disclosure of secrets professionally communicated to him, must be conclusive. His statement to that effect at law was so, unless it appeared from the nature of the question, that the principle of protection did not apply to it, as whether he was the attesting witness to a deed. The demurrer was overruled because it did not state that his knowledge was obtained solely through his client in his relation of solicitor. But it was overruled without prejudice to the witness objecting in writing to the interrogatories, upon such grounds as he should state in such objections or demurrer."

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The case of *Parkhurst v. Lowten* is reported, 2 Swanston, 194, from which much information may be obtained both upon the practice, and the extent of the rule exempting an attorney from deposing on the ground of professional communications by his client.

The practice when a witness objects to answer before a Master may be drawn from these cases.—The witness should state his objections in writing in the form of a demurrer after being sworn.

If the interrogatories are in writing, the demurrer refers to those objected to, by their number, as was done in *Parkhurst v. Lowten*. If the examination is oral, the questions should be stated in the demurrer, which may be done with precision if they are short, or they may be reduced into form as interrogatories and referred to in the demurrer as above mentioned. See the form, Appendix, No. 27.

The Master may exercise his discretion in directing the questions to be reduced to writing or not according to the case. He may also give time to frame the demurrer.

The examination should be gone through upon all the matters the witness may be called for, in order that if there are other questions which he objects to, they may all be brought before the court together. If the objections are overruled, the court probably would not restrict the order, to answering the questions in the demurrer solely, but allow others to be put relating to the subject. This might be important, particularly if the questions were hastily reduced to writing on an oral examination.

When the demurrer is completed, the Master should indorse upon it a certificate of its having been taken before him.

I presume it would be correct for him to furnish copies to the parties. The manner of bringing the subject before the court would be, (strictly following the present English practice) by setting down the demurrer regularly to be argued.

The strong inclination of our court however to prevent cost and delay would induce it to follow the course taken by the Vice Chancellor in *Parkhurst v. Lowten*, unless there are clear objections to that mode. What objections can be taken to it, except merely that it is not similar to that upon other demurrers, I do not know ; but unquestionably it would save time and expense.

I apprehend therefore, that the court will support a special motion that the demurrer be overruled, and that the witness go before the Master at a time to be fixed by him, upon being served with a subpoena *ad testificandum*, and submit to answer

the questions demurred to. Notice should be given to the witness. A witness cannot demur to a question, because it is not pertinent to the matter in issue.

"The bill was exhibited to prove a will, and perpetuate testimony. The witness was interrogated as to what deeds or settlements he knew the testator had made, to which he demurred, as not pertinent to the matters in issue. Lord keeper overruled the demurrer, because he would not introduce such a precedent as for a witness to demur, it did not concern the witness to examine what was the point in issue."

Ashton v. Ashton, 1 Vernon, 165.

CAP. II.

SECTION 7.

APPLICATIONS TO THE COURT.

IF the Master is impeded in the investigation by the want of sufficient power, an application must be made to the court.

"I apprehend it is the duty of the Master to go on with the accounts until he finds a difficulty arising from the want of sufficient powers: then an application must be made to the court by himself, or the parties, in order to supply the defect of his authority."

Per Lord Eldon in Taynter v. Houston, 3 Mer. 297.

But an application to the court to direct a Master upon a point of practice is improper.

The Vice Chancellor said, "A motion to ask the opinion of the court as to the form of a report of a Master is improper." The opinion sought was, whether, on a report as to the sufficiency of an answer, the Master should state the particular exceptions allowed and disallowed, or merely that the answer was insufficient.

Agar v. Gurney, 2 Mad. Rep. 389.

Applications to the court for its judgment upon points arising in the reference, are made, by separate reports.

SECTION 8.

SEPARATE REPORTS.

Separate reports are of matters arising in the course of a reference incidental to the general report, and necessary or

convenient for immediate determination for the satisfaction of parties, or the aid and instruction of the Master.

Upon the distinction between these and special reports, see *post*, under the head *report*.

Newland,
171.
1 Turner,
183, 194.

They can only be made by permission of the court, given either by a fresh order, or by the original decree.

Ibid, 198.

Thus on a bill by a creditor against an executor, if in the progress of the investigation, a party is dissatisfied with the Master's judgment upon a creditor's claim, he may apply for an order that the Master make a separate report upon the matter, and the decision of the court is obtained upon exceptions, or if the point is short upon motion. So in a case where the maintenance of infants is directed, and it is necessary to obtain the allowance before the general report comes in, an order must be obtained for the Master to make a separate report of the personal estate, &c. and what is a proper allowance.

Frequently the decree authorizes the Master to make a separate report upon particular matters, which are to be settled in the course of taking an account, as in *Vane v. Dungannon*, 2 Sch. & Lefroy, 134, 5. and *Basset v. Percival*, 1 Coxes Cases, 272.

Slee v.
Bloom, 27
May, 1822.
Iverson v.
Tappen, 20
Aug. 1821.
1 Turner,
200. and 2
Fowler, Ex.
P. 332. citing
Carter v.
Carter, 1731.
May, 1822.

It is also frequent in our decrees to authorize the Master to apply further directions upon questions arising in the course of the account, and this application is made by a separate report.

The same course of practice is to be pursued upon preparing, and settling this report as upon a general one.

And in the case of *Slee v. Bloom*, in which a separate report of some importance was made, the regular course was pursued, and the cause brought on upon exceptions. But there is a late decision which appears to warrant a more expeditious and simple mode of bringing the case before court.

Van Kamp v.
Bell, 3 Mad.
Rep. 430.
1818.

"Under a decree directing it, the Master made a separate report as to certain matters; a petition was presented at the Rolls to confirm it, and for consequential directions: the petition was heard, and stood for judgment. The plaintiff then, (dissatisfied with the opinion which the Master of the Rolls appeared to entertain,) set the cause down for further directions, on the separate report.

It was moved to strike the cause out of the book.

The question was, whether the separate report ought to be brought on for the consideration of the court by petition, or by setting down the cause for further directions.

The *Vice Chancellor*.—"The decree in this case follows the common language of such decrees, that the consideration of all further directions shall be reserved until the Master shall have made his general report. The cause therefore cannot be set down for further directions on the separate report; but any order upon the separate report must be made on petition."

As the subject of a separate report is usually either an unimportant collateral matter, such as an allowance for maintenance, or one or more distinct principles to be decided by the court, a petition is clearly the best and readiest mode of bringing it up. And in such cases as embrace more numerous questions, and where both parties would take exceptions, a petition may be presented by each, stating the modifications deemed proper, and praying an order appropriate to them. Then the court would no doubt, at the request of either party on the day of presenting the first petition order that both should be heard together, and make such order upon the whole matter as it should deem just.

By this course, the great advantage is obtained, of hearing the separate report in vacation.

In England, separate reports are principally made in cases of maintenance, and it is settled that exceptions will not lie to them. They are brought up on petition. 1 Br. C. C. 577. 1 Turner, 200, 1.

2d. REPORT.

Reports are either *separate* or *general*. The nature of a separate report has been stated.

The term *Special Report* frequently occurs in the books of practice. There appears to be two distinct meanings in which it is used.

In the first place it applies to a report, stating matters and circumstances of importance in the cause, but which the particular directions of the decree do not call upon the Master to state. In such a case the Master has sometimes thought himself without authority to state them, and a special order has been procured.

"Thus on a bill for specific performance, the plaintiffs, vendors of an estate, having procured a report that a good title could be made, had a decree for a specific performance.—And a further reference was directed, with a view to costs, as to the time when an abstract containing a sufficient title was delivered, and when objections to the title were made by the defendant. Under this order, the Master did not think himself authorized in reporting that the defendant had not the pur- Hand's Sol. Ass. 164.

chase money ready, or any other matter he might think special. Upon special motion, it was ordered, that the Master be at liberty to report, whether the objections alleged by the defendants to have been made to the title, were the only reasons why they did not carry the agreement into execution, and that he be at liberty to state in his report any other matter he may think material for the information of the court."

It is to prevent this difficulty, that the *decrees* so frequently authorize the Master to state any special matter.

Exch. Prac.
2. 328.

Mr. Fowler says,—“It is part of the usual directions to the Master in matters referred to him, that he may report specially thereon, if he thinks fit, and therefore where a special matter arises out of the general matters referred, he may in his general report certify the special matter, and submit it to the judgment of the court.”

2 Atk. 620.
Anon.

Lord Hardwicke however has decided, “That the Master is at liberty to state any special matter, although there is no direction in the decree for that purpose.”

The other sense in which the term is used in the books is, where the Master, instead of stating the conclusions he has drawn, and giving a decision upon the subject, sets forth the various facts and matters he has found, or the evidence on each side, and compels the court to examine the whole, and draw the conclusion itself. Several orders of court have been made upon this subject.

Lord Bacon's
orders,
Beames,
page, 23.

“The Masters of the court shall not certify the state of the cause, as if they would make breviate of the evidence on both sides, which doth little ease the court; but with some opinion. In case they think it too doubtful to give opinion, and therefore makes such *special certificate*, the cause is to go on to a judicial hearing without respect had to the same.”

ibid. 30. 208.
Pract. Regis.
377.
Curs. Can.
429.
Newland,
177.

This order is more explicit than the subsequent orders by Lord Coventry, and Lord Clarendon, usually cited in the books of practice. That of the former runs. “That the Masters are not, upon the importunity of counsel or clients, to make *special certificates* of matters, when the court expects an opinion from them; nor are they to do it, but where their own judgment in respect of difficulty, leadeth them to it.” The latter order is the same, omitting the words,—“When the court expects an opinion from them.”

1 Atk. 453.

“In the *Duchess of Marlborough v. Wheat*, Lord Hardwicke said, That Masters in reports which are *special*, are not to set forth the *evidence* with their opinion upon it, but only to state the *bare matter of fact* for the judgment of the court.”

I understand Lord Hardwicke to refer to the special reports now under consideration; and to mean, that the Masters should find the *facts*, though they leave the judgment upon those facts to the Court, and should not merely state the *evidence*, and their opinion that such evidence establishes such facts.

But this species of special report has of late been much dis-
countenanced by the court.

"By a decree at the rolls an inquiry was directed as to the fact of the death of Charles Lea. Upon that question, the Master did not draw any conclusion; but the report stated the circumstances.—That Charles Lea went to America; that upon his arrival there a letter was received from him, and that since that period which was fourteen years before the date of the report, he had not been heard of. No reason appeared why he should not have been heard of, if living.

Lea v. Willock,
6 Vesey,
606.

The Lord Chancellor said,—The evidence is strong in favour of the presumption of death. But I approve what I understand to have been Lord Alvanley's course, to make the Master draw the conclusion.

It is singular that the court should send such a question to the Master, and that he should send it back to the court."

"So in *Dixon v. Dixon* the Master had merely stated certain facts under an order directing him to enquire whether a party was living or dead. His report certified, that the individual had gone to sea about twenty-eight years from the time of his report, and that he had been heard of as being in the East Indies in an ill state of health about a year afterwards, since when there had been no intelligence of him. Sir P. Arden, *M. R.* referred it to the Master, to review his report by drawing a conclusion from those facts, which he accordingly did by stating his opinion, that he had died in the testator's life time."

3 Br. Ch.
Rep. 510. n.
1. Bell's Edft.
5th.

There is also the common acceptance of the term *special* report, as a report setting forth the material facts found, leading to the Master's conclusion, and not the result merely. The Master's judgment in each particular case must be his guide whether to make such a report or not.

When the Master has investigated the several matters referred to him by the decree, he proceeds to make his report.

Newland, 1
Vol. 340. 2
Edn.
Chy. Pr.

Mr. Blake states that a summons for a final hearing is first taken out, and the matters argued before the Master.

If strict practice by charge and discharge, has been pursued, this would generally be useless, as every disputable item will have been contested as it was brought forward. Indeed in

any mode of proceeding, all the important principles of the case are usually brought before the Master in the progress of the reference. It is a practice not recognized in the books, and not usual here; and its advantages do not seem equivalent, to the delay and expense. Full opportunity for discussion is given upon the objections.

Cases indeed sometimes occur which have been so conducted as to render it advisable to take this course. But it is matter of convenience merely, and the solicitor is unquestionably not irregular who ~~does~~ it.

Either party may call upon the Master to make his report and take out the warrant upon it, though this is usually done by the complainant's solicitor.

The first summons is underwritten,—“The Master has prepared a draft of his report.” Sometimes,—“To peruse report,” or, “To hear report.”

The object of this summons is to give the parties an opportunity of examining the report, which they are at liberty to do on the day of the return: and if they think proper, they may take a copy, or of such part of it, as they desire.

By a former rule of our court, the Master could not charge for a copy of the draft of his report. Perhaps this was adopted to check a practice, which is yet some times resorted to of the Masters making copies of his draft, without an application, and the solicitor of the acting party serving them; the first summons then being to settle the draft.

This rule has been repealed, and the Master is allowed to charge for copies of the draft of his report, furnished to the parties in those cases in which, by the practice of the court, he delivers a draft before signing, that the parties may take objections,

The practice of summoning to peruse tends to prevent the charge for copies of the draft; as frequently the solicitor will be satisfied with an inspection of the report, and will take a copy only in cases of difficulty.

If all parties inform the Master that they shall want a copy of his draft report, (which is frequently the case,) this summons may be dispensed with. This summons should be served whether the party has attended or not.

In all cases the draft of the officer's report is to be served upon the opposite party, as well where both parties have attended, as where the officer hath proceeded *ex-parte*. By the Irish practice the draft or a copy is served with the officer's notice of the time to attend.

1 Turner,
229.
Beames or-
ders, 258.
2 Fowl. Exch.
Pract. 326.
1 Turner,
229.
Newland.

Beames or-
ders. 258.
Order, Oct.
1683. & *Ibid.*
376. order,
Nov. 1743.

Rule 95.

Howard's
Eq. Side. 1,
40.
Ibid. 36.

The Master however clearly should not allow any further evidence to be produced, or examination had, at that stage, but should merely hear the adverse party as to the propriety of the conclusions he has drawn from what is before him.

The only inconvenience is, the delay of the summons. The next step is to take out a summons, underwritten, "To settle draft report." If no copy of the draft is bespoken, this may be dated on the return day of the first summons, otherwise, after the copy has been furnished.

Turn. 229.
Fowl. 2. 326.
Newland.

"In settling the report as many warrants may be taken out, as are necessary. The object of this warrant is thus stated by Mr. Turner,—“Attention is requisite in this stage of the cause, that the questions which have been revised upon settling the draft before the Master, and his determination and opinion thereon, have undergone sufficient consideration, and that the proceedings in general upon the inquiries before him, may be so stated in the general report, that the interest of all the parties who appear by their solicitors, may be brought before the court upon the hearing. In attending the warrants to settle the draft, the respective solicitors must state to the Master such alterations as in their judgment they think expedient, and if any evidence has been omitted, it must be brought forward in strictness before the report is settled.

Fow. Exc.
Prac. 2. 326.
1 Turner.
229.

That the object of this summons is to preclude the production of any further testimony is shown by the following cases.

"In *Thomson v. Lambe*, one of the exceptions was, that the Master had refused to receive further evidence because produced after his report was settled.

7 Vesey,
587.

Lord Chancellor,—The Master gives due notice according to the course of the court, that his report is to be settled on a particular day.

What is he to do? The extent of the mischief is obvious, if the Master is to proceed up to the point of settling his report before the parties without any consideration of respect to the Master, state what they mean to prove, or by what proof. The rule must be, that he who will not produce his proof, before that stage, must be told he came too late. Exception overruled."

"So in *Fearon v. Dawes*, an exception was taken on the following part of the report,—“and the said Master Holford found, that after he had considered of the said state of facts, and charge laid before him by the plaintiff, and had been several times attended by counsel on behalf of the parties, and after he had approved of the said report, the said plaintiffs brought in objections to the draft of his report, and at the same time

Cited from
the Register's
book in
Beames
Orders, 259.
n. 2.

laid before him an affidavit in support of such objections, but such affidavit not being laid before him, previous to the bringing in such objections, he did not take the same into consideration.' The exception was overruled by the Master of the Rolls."

There are two points of practice in proceeding upon the report, as to which the books differ. Whether a summons, "*to sign report*," as well as one "*to settle*," should issue, and when, (which indeed depends upon the other question) objections should be filed.

In *Harrison's practice*, the course is thus laid down :

2 Harr.
Pract. Rep.
Farrand's
Edit.

"When the Master has fully heard both parties, he prepares a draft of his report, and at the request of either party, issues a warrant for the parties to attend, who have liberty to peruse such report, and take copies, and after that either party may take out a warrant to settle the report, which the Master will do unless either party at *that time* bring in objections in writing to the draft, and take out a warrant thereupon ; then the adverse party takes a copy of the objections, and either party may take out warrants to be heard thereupon, and the Master allows or disallows them and settles his report."

Published in
1776. Vol. 2.
486.

So in the *Solicitor's guide*, it is stated,—“The Master having gone through the matter referred to him, prepares a draft of his report.

The parties may take office copies of such draft, and either side may take out a *four day* warrant on such draft, "*at which time the Master will sign his report*." If either party has objections to the report, the same must be made in writing, and delivered to the Master's clerk, and a warrant must be taken out thereon."

Chap. 9.
Sect. 3. Tit.
Master's re-
port.

So in *Newland's Practice*—"The Master previously to making his report, prepares a draft of it, and issues a warrant for the parties to attend him, who are at liberty to peruse such report and take copies. If either party is dissatisfied with the report, he ought to bring in objections in writing to the draft of it, and the adverse party takes a copy of those objections, and either party may take out warrants to be heard on them. The Master after having considered the objections settles his report, 'previously giving notice of his intention to do so on a particular day.'"

This course seems to have arisen from the following order.

29th Oct.
1683.
Beames' Or-
ders, page
258.

"Every Master, to whom any account is referred, or other matter, by any order upon the hearing of the cause, when he hath fully heard both parties, and prepared his report, shall, at the request of either party, give out a summons, that both

parties, or some for them, shall again attend him, who shall have liberty to peruse such his report, or take a copy thereof. And that such person that is dissatisfied therewith, do, in *four days next after such attendance*, bring in a note in writing of their exceptions thereto, and take out a summons to be heard thereupon, and then the said Master is to settle and finish his report as he shall find just."

The practice in Ireland is similar.

"When the officer has gone through the proofs, he draws up his report, the draft or a copy of which, he gives to either party requiring it, to be served upon the other party; first writing upon the back a notice that it is the draft of his report, and that the party is to object to the same in usual time, or that he will sign the report; and if the party sees cause to object, he is in four days to return the draft with his objections in writing, and is to summon the party in whose favour the report is made to attend the officer upon such objections.

Howard's Eq.
Side. 1. 36.

When the objections are disposed of, or if none are filed within the four days, the officer will sign his report."

The Chancellor appears also to have had this course in view in declaring the practice in *Remsen v. Remsen*: "After the examination is concluded in cases of references to take accounts, or make inquiries, the parties or their solicitors, after being provided by the Master with a copy of his report, ought to have a day assigned them to attend before the Master to the settling his report, and to make *objections in writing*, if any they have." On the other side, in *Turner's Practice*, a book superior to any other as to the practice in the Master's office, the course is thus stated. After noticing the warrant to peruse report, and that warrants may be then taken out to *settle*, the object of which he explains in the passage before cited, he proceeds to state,—That the solicitors upon the attendance on the warrants to settle, state to the Master the alterations they deem expedient, and when these have been disposed of, he signs the draft, from which the clerk makes a transcript, and a warrant to sign the report must be then taken out, underwritten,—“at which time the Master will sign his report.” Which is a warrant of four days. If a party is dissatisfied with the report, he must bring in objections in writing to the draft within the four days limited by the warrant.

2. J. C. Cr

1 Tur. Pr.
329, 5th,
Ed.

Ibid. 239.

And again,—“If any party should leave objections to the draft (which must be left in strictness within the four days appointed by the return of the warrant to sign, or before it is actually signed) he takes out a warrant upon the objections. The report cannot be signed until the objections are gone

Ibid. 232.

Dickens, 362. The Court in a special case has permitted exceptions without the objections, or sent it back with liberty to object.

Allen v. Alien. "Application to take exceptions to a report, although no objections were left with the Master.

Valence v. Weldon. Sir Thomas Clarke, *M. R.*—It is a practice long established, not to admit of exceptions after report, and no objections taken to the report; but if the Court sees reason to be dissatisfied, it may refer it to the Master to review his report, and let the parties be at liberty to take objections."

See a note of Mr. Swanston upon this subject, in 1 Swanston.

As to the mode of drawing a report, the rules cannot but be vague, much must be left to the judgment of the Master, where to be full or brief, in the detail of facts.

An Argumentative report is always improper. The Master sometimes states shortly the *reasons* of his decision, but it is never correct to argue their validity.

Beames Orders, 208.

Lord Clarendon made the following order upon reports.

"That Masters' certificates, and reports should be drawn as succinctly as may be (preserving the matter clearly for the judgment of the Court,) and without recital of the several points of the orders of reference which do sufficiently appear by the orders themselves, or the several debates of counsel before them; unless that in cases where they are doubtful, they shortly represent to the Court the reasons which induce them so to be."

Ibid. 81.

Lord Coventry also made an order upon the subject of recital of orders. "Whereas the Masters of the Court do sometimes by way of inducement fill a leaf or two of the beginning of their reports, and sometimes more, with a long and particular recital of the several points of the orders of reference, they shall forbear such iterations, the same appearing sufficiently in the order, and without any other repetition than thus,—"According to an order, or, by direction of an order of such a date, shall fall directly into the matter of their report, setting down the same *clearly, but as briefly* as they can."

2 Harrison, 154.

"A report of the Master is as the judgment of the Court."

A report or certificate can only be falsified by affidavit or other clear proof.

Allen v. Pendlebury, 3 P. Wms. 142, note B.

"A Master by his report certified that the defendant had submitted to deliver part of the plate in question to the plaintiff, to which the defendant excepted, insisting that he had made no such submission. Resolved, that by means of the report, the proof lay on the defendant, whose affidavit at least was necessary to falsify what had been certified; for though there is no reason that the Master's report should be arbitrary and conclusive upon any one, yet it shall be presumed *prima*

facie to be true and turn it, on the other side to shew the contrary."

"An exception was taken, that the Master had certified that the plaintiff used the money of the intestate's estate in his trade, whereas the evidence did not warrant such a conclusion.

1 Johns. Ch.
Rep. 623.
Schiefflin v.
Stewart.

The Chancellor,—As the plaintiff took no exception to the testimony taken before the Master, and has not shewn by affidavit what that testimony was, nor called upon the Master to report the facts, I have a right to presume that the Master had sufficient evidence before him to warrant the conclusion. I am bound as the case is now before me, to consider every fact stated in the report to have been duly established by competent proof."

For the form of a report, See Appendix, No. 28. and of objections, See No. 29.

SECTION 9.

GENERAL RULES UPON ACCOUNTING.

It is not proposed to do more on this subject than to state some of the general rules of the court, which the Master is most frequently called upon to apply.

1. In the first place, the great and vexed question often arises how far the defendant who is charged by his own statement may discharge himself by the same.

The Chancellor in *Hart v. Ten Eyck* has adopted the rule to the extent, and in the language stated by Lord Chancellor Cowper in 1707. *Gilb. Law. Evid. 45*. "The defendant an executor stated in his answer, that testator left £1100 in his hands, and afterwards on a settlement, received his bond for £1000 and gave him the £100 for his trouble. This was the only proof of the £1100. Lord Cowper said,—that when an answer is put in issue, what is confessed and admitted by it need not be proved, but that the defendant must make out by proof what was insisted on by way of avoidance. There was however this distinction to be observed, that where a defendant admitted a fact, and insisted on a *distinct fact* by way of avoidance he must prove it, for he may have admitted the fact under an apprehension that it could be proved, and the admission ought not to profit him so far as to pass for truth whatever he says in avoidance. But if the admission and avoidance had consisted of one *single fact*, as if he had said the Testator had given him £100, the whole

3 Johns. Ch.
Rep. 87.
Gilb. Law.
of Evid. 45.

* In discussion
of 52 in ch. of

Errors

In addition

p. 417

Notes to
Pothier, 158.

must be allowed, unless disproved." Mr. Evans approves of, and thus states this doctrine.

"A man's own admissions and representations shall be allowed as evidence against him, but he shall not be subjected to having one part of the same act considered without the other.

The rule mentioned by Gilbert where the whole constitutes one fact, is founded upon the most prudent principles of justice. Although relying upon the admission of one fact shall not conclusively establish the assertion of another, the representation of one and the same fact must not be garbled and distorted."

§ Vernon,
194.

In *Audley v. Audley*, the court said the case of *Howard and Brown* was the first case in this court, where, because a man had charged himself by answer, that his answer should be allowed as a good discharge, and that it ought to be the last.

Boardman v.
Jackson, 2
Ball &
Beatty, 382.

This rule applies to schedules, to answer as well as statements in its body. "On a decree for an account, the plaintiff in support of his charge, produced an account dated long before the bill filed, drawn out by direction of the defendant, and furnished the plaintiff. By this account there was a balance due the defendant. Plaintiff contended that the credit side of the account might be used to charge the defendant, but he might not read the debit side in discharge.

The Master reported the point.

The Lord Chancellor ruled the point in favour of the defendant, taking the distinction, that the account formed no part of the pleadings in the cause, and the question was to be governed by the rule at law, that where a party produces a document, he cannot use it partially: he makes the whole evidence, and it must be taken together."

He also says—"That it was admitted in argument, that where a bill is filed against a defendant to account, if the defendant set forth in a schedule to his answer an account charging himself with sums of money, and in another schedule an account of disbursements, he cannot according to the practice of the court, avail himself in taking the account, although he would be charged on his admissions in the first schedule."

10 Vesey,
582.

The case of *Robinson v. Scotney*, shows the rule as to schedules to an answer clearly.

"The defendant, an executor, charged himself by answer, with £400, money at the Testator's Banker, and received by him,—he stated this sum in the column of receipts, and in the other column of payments, &c. stated a book debt of the testator to him as by Ledger, and the sum of £200 received by testator for the good will of a house, on account of the defendant:

claiming a balance in his favour. The Master charged him the £400 and disallowed the two sums claimed by him.

The exception to the report was disallowed, on the ground that the admission of the £400 stood distinct from the allegation of debt.

The Chancellor, in *Hart v. Ten Eyck*, cursorily states, that in his opinion, there is a distinction as to proofs between the answer of the *defendant*, and his *examination* as a *witness*, having referred to the case of *Kirkpatrick v. Thrup*, (Ambler 509) as one in which the parties were examined as witnesses against each other.

It was before shewn, that an examination is in truth nothing but a further answer of the party, to matters inquired to after hearing; and that its object and nature are exactly the same. It is wholly different from the technical *evidence* of witnesses. Like an answer it is to procure from a party statements against himself.

I shall adduce the cases in which the rule in question has been considered in respect to examinations, and I think it will appear they are consistent and decided upon the same distinction which has been applied to answers.

“Plaintiffs had dealings with defendant in merchandize. There was a decree for an account, and both sides to be examined on interrogatories. Plaintiffs admitted the receipt of a parcel of satins from defendant, and in the same sentence, swore he had paid defendant for them. The Master refused to charge the plaintiffs with the satins, and the court was of the same opinion, as plaintiffs charged and discharged themselves in the same sentence; otherwise it had been if the discharge had been in a distinct sentence.”

*Kirkpatrick,
and Thrupp,
v. Love,
Ambler,
589.*

Mr. Ambler makes this marginal note, “*Talbot v. Rutledge*” *ad idem*—about the same time.

*Talbot v.
Rutledge,
cited in
Blount v.
Burrows,
4 Brown, G.
R. 73.*

“Under a general decree on an account between partners, the defendant was examined touching his receipts, &c. He acknowledged the receipt of some sums of money, but swore in his examination, that he disbursed those monies at other times on account of the partnership. The Master charged him, and refused to discharge without proof. There was no other evidence to charge him.

Lord Hardwicke said, the rule of this court and the court of law, as to reading an *answer or examination* against a defendant, was different.

In this court if a man is to be charged by a book or other writing, he shall also be discharged, if the entries are made for that purpose therein; and so have been many cases relat-

ing to Goldsmiths' and Merchants' accounts; and that was allowed in a case relative to the estate of Sir Stephen Evans. But what is sworn by a man's answer or examination admits of a different consideration, as, if a man admits by his answer that he received several sums of money at particular times, and in the same answer swears he paid away those sums at other times; he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness. The report was confirmed.

Blount v.
Burrow, 4
Brown,
C. C. 73.
1 Vesey, jun.
546.

"Decree against an executor for an account. To interrogatories he put in this examination.

"This examinant saith that the said Testator did on or about the day of (being about twelve days previous to his death) give and deliver to this examinant four India Bonds for the respective sums of £100 for this examinant's use, to enable him to carry on and maintain a suit which said, &c."

The Master charged the defendant with the bonds as part of the testator's personal estate.

Report in
Vesey.

Lord Commissioner Eyre, said,—The examination is evidence in discharge of a party who is charged by it. The modern cases have gone far for that, and rightly.

Lady Kilmurray v Crew,
Dickens, 60.

"Application that in taking the accounts under the decree, the examination of the Plaintiff taken before the Master might be allowed as evidence in her discharge was refused."

Thompson v.
Lambe. 7
Vesey, 589.

"Lord Chancellor,—Upon the other point I am clearly of opinion a person charged by his answer, cannot by his answer discharge himself, nor even by his examination, unless it is in this way,—If the answer or examination states that upon a particular day he received a sum of money and paid it over, that may discharge him; but if he says, that on a particular day he received a sum of money, and upon a subsequent day paid it over, that cannot be used in his discharge, for it is a different transaction."

This appears to be the true principle, viz.—That the charge and avoidance arise from the same transaction, the same fact; not that they are stated in the same sentence. Being the same transaction, it almost necessarily must be stated in the same sentence; but if distinct transactions are contained in the same sentence, it cannot make the discharge good.

All the preceding cases, if tested by this distinction, will I think be found consistent, and in conformity to the decisions upon answers.

It may fairly be presumed, that it was the same transaction in *Kirkpatrick v. Love*,—That the payment was made at the

time of the receipt. The statement is said to have been made in the same sentence, and there is nothing to make the supposition doubtful. So easy a solution may certainly be resorted to, to prevent the supposition that Lord Hardwicke should contradict himself in two cases, about the same time.

Talbot v. Rutledge was clearly a discharge arising from a different transaction. The receipt was admitted, and the monies stated to have been disbursed at different times: Whether stated in the same sentence, does not appear.—If not, the cases would differ literally upon the distinction taken by Lord Hardwicke in the case in *Ambler*; but I conceive the true construction of that distinction is the one above stated.

Blount v. Burrow was precisely the case of the admission and discharge constituting a single fact, or transaction. The admission of the possession of the bonds is only made in the statement that the testator gave them to the defendant, for the purposes mentioned. It is exactly the case supposed by Lord Cowper, if the testator had given the defendant the £100—the admission and avoidance consisting of one single fact; and lastly the case of *Thomson v. Lambe*, is clearly and literally in support of the difference.

The rules of the Scottish law are the same as those of the English chancery, upon this subject.

“Regularly, no person’s right can be proved by his own oath, nor taken away by that of his adversary. But where the matter in issue is referred by one of the parties to the oath of the other, such oath, though made in favour of the deponent himself, is decisive of the point; not because a party’s oath in his own cause is evidence, but because the reference is a virtual contract between the parties, by which they are understood to put the issue of the cause upon what shall be deposed. An oath upon reference is sometimes qualified by special limitations restricting it. The qualities which are admitted by the judge as part of the oath, are called intrinsic; those which the judge rejects or separates from the oath extrinsic. Where the quality makes a part of the allegation which is relevantly referred to oath, it is intrinsic. Thus because a merchant suing for furnishings after the three years, must in order to make a relevancy, offer to prove by the defender’s oath, not only the delivery of the goods, but that the price is still due; therefore though the defender should acknowledge upon oath his having received the goods, yet if he adds, that he paid the price, this last part, being a denial that the debt subsists, is intrinsic; since it is truly the point referred to oath. Where the quality does not import the extinction of the debt, but barely

Erskine’s Institutes, Book 4. Tit. 2. 3.

Ibid, 5.

a counter claim, or *mutua petitio*, against the pursuer, it is held as extrinsic, and must be proved *aliunde*."

Upon the general subject, it may be remarked, that the point of view in which an answer or examination is to be considered, is not as *evidence strictly* but the *confession* of the party; a confession however, compelled by a court of Equity. In the tribunals both of law and equity, the party's admission is strong against him. In neither, could statements made by himself at a different time from that of the admission to the same or to different matters, avail him to neutralize the admission.—So far they agree.

A Court of Equity goes with a Court of law also to this length, that where the admission and avoidance is so united that they make but a single transaction or subject, the whole shall be taken together, and the statement shall be as good to discharge the party as to make him liable. The case of *Thrupp v. Love*, as before stated is of this kind, the party saying he had received goods, and at the same time paid for them: so at common law the case of *Carver v. Tracey*, 3 Johns. Rep. 427. a party saying he had received a sum of money which the plaintiff owed him.

And here begins the only difference between the courts. If the admission and discharge are distinct transactions at different times, the admission is taken, and the discharge must be proved, in a court of equity.

Is there not good reason for this variance of rules?

In the case of a voluntary confession, there is no inducement to fabricate a discharge, because there is no necessity for making the admission. But the admissions of an answer are compelled by the power of the court.

The rule in question does not apply to the books or papers of a party produced under the general order of the court for that purpose, at the instance of the adverse party. These are considered as evidence, and must be taken in discharge as well as to charge.

"A book of accounts relating to an estate was produced on taking the account, and there was proof that the book was made up from vouchers, and that part of the monies had been paid, and the witnesses, believed the rest had been. The plaintiff charged the defendant only by the book. Upon exceptions to the report, the question was whether the Master ought not to have allowed the book as a discharge as well as a charge. The Lord Keeper adjudged it should be allowed as a discharge, the rather, because the executrix and her husband and the servant who kept the book were dead, which amounted to length

Darston v.
Earl of Oxford. 1 Eq.
ab. 10.

of time, which was always held a good reason for allowing of it, and so took it to be a good rule, and fit to be established, that where a man was charged only by an oath or a book, the same should be his discharge. And the case of *Mellish and Turner* lately adjudged was cited, where books had been lost at the earthquake in *Smyrna*, so that the plaintiff could only charge the defendant Turner by his own books, the same books were admitted to be his discharge."

So Lord Hardwicke states the same rule in *Talbot v. Rutledge*, (cited 4 Br. C. C. 73.) and takes the distinction expressly between books or other writings, and an answer or examination.

And the case of *Boardman v. Jackson*, (2 Ball & Beatty, 382.) strongly supports it: The document produced by the plaintiff was on account made out long before the bill was filed, by direction of the defendant, and furnished to the plaintiff. And the court allowed the one side of it in discharge as well as the other to charge.

So also in *Carter v. Coldrain*, the defendant produced an account book before the master, to charge the plaintiff, insisting that the whole book was not thereby made evidence for the plaintiff. Lord Hardwicke's opinion was, inasmuch as the defendant read that part of the book wherein was contained the charging part of the account, that the plaintiff was entitled to read the discharging part for himself."

Barnardiston's Rep. 126.

Of course such books and accounts are only *prima facie* sufficient, and may be impeached either by what appears on the face of them, or by testimony.

Vouchers are *prima facie* sufficient evidence of disbursements.

"In taking an account before the Master, vouchers were produced by the defendants as evidence of payments, but for want of proving the hand writing of the person who signed the voucher or receipt, the plaintiff's solicitor objected to the evidence. The account being of long standing, the vouchers of this description were numerous, and the Master being desirous to have the directions of the court upon this point, Mr. Newnham moved, that the Master might receive these vouchers in evidence without further proof, and after hearing counsel, the court laid down this to be the rule, namely, that in all matters of account, the party who produces the vouchers in support of payments, produces those vouchers at his peril, and the Master is bound to admit them in evidence, except the other side can lay a reasonable ground to shew that the voucher in ques-

Earl of Lonsdale v. Wordsworth, May, 1789, in Scac. cited 2 Fow. Exch. Prac. 239.

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tion can be impeached, of which the Master is to judge, and then to grant a commission to examine into the truth of it or not, as he thinks proper; and accordingly the court ordered the Master to receive the vouchers as evidence."

The accounting party may discharge himself upon his own oath for sums not over \$20 and not exceeding in the whole amount £100, which I take to be Sterling \$444,44 but he must swear unto whom paid, for what, and when. 1 Vernon, 283, anon. Remsen v. Remsen.—2 John.C. C. 501.

In a suit in Chancery between Partners, the books of the Partnership are evidence, and vouchers, as to the particular items are unnecessary.

"It appears a novel doctrine to me, that in settling of accounts from the books of a Copartner, where all the partners are equally interested, vouchers for the specific items should be required." Per Fleming, Judge, in Fletcher v. Pollar, 2 Hen. & Mum. 549. The ground is, the right and opportunity of inspecting the books.—4 Hen. & Mum. 368.

The Court will sometimes admit accounts to be *prima facie* evidence for a party, on the ground of great length of time.

Chalmers v.
Bradley, 1
Jac. & Walk-
er, 65. 1819.

"It was to be ascertained what was the value of an estate in the year 1770, 1775, and 1789, for which purpose its state at the time, the attempts to sell it, and the amount of the rents were to be considered. The Master of the Rolls said,—In making the estimate, I think the Master will do right, if any account of the rents and profits have been kept, to take them as *prima facie* fair accounts, subject to any objection that the other party may make to them, so that they may not be precluded from shewing, if they can, what the amount really was.

Payton v.
Green, 1
Rep. in Chy.
146.

The next question will be whether, at any period up to 1789, J. B. was in advance beyond the assets received by him, and to what extent. Here again I think it will be very reasonable, if an account was regularly kept of the administration of the estate, that it should be considered as *prima facie* evidence of his receipts and payments, throwing on the other side the onus of impeaching it. J. B. was dead."

"This court ordered that in regard the account in question is of twenty years standing, the defendant shall prove his account by his own oath, for what he cannot prove by books and cancelled bonds; for that after so many years, his own oath must be excepted as a proof in this case."

4 Dowd P.
C. 30.

In the case of *Lewes v. Morgan*, there had been various transactions between attorney and client, accounts settled, and

securities given upon the foot of them. It was alleged that vouchers had been lost or delivered up, at such settlements.

The decree upon opening the accounts, directed, *that if in taking the accounts, it should appear to the deputy remembrancer, that any voucher in support of any article in such account was lost, and could not be found, that the party should make oath, that such voucher did theretofore exist, and of the contents or purport of such voucher, and that the same had been delivered up to the other party.*

The question I believe has not been before our court of chancery, whether entries in a tradesman's books by himself are admissible evidences of goods furnished in the regular course of business. I presume that by analogy to the decisions in the Supreme Court, they will be allowed.

Such proof is admissible only to the regular entries in the usual course of business ; there must have been dealings between the parties, the character of the books must be established as honest, the delivery of some of the articles must be proved, and it must be shown, the tradesman kept no clerk.

8 Johns Rep.
212. 12 Johns.
Rep. 461.

In addition to these circumstances, this court can procure the oath of the party to his entries : and then our equity rule will be the same as in the Scottish courts.

"Books of account kept by merchants, tradesmen, and other dealers in business, though not subscribed, are probative against him who keeps them ; and in *case of furnishings by a shopkeeper*, such books, if they are regularly kept by him supported by the testimony of a single witness, afford a *semi-plena probatio* in his favour, which becomes full evidence by his own oath in *supplement*."

Erskine's
Inst. Book 4.
Tit. 2. 2.

2d. ANNUAL RESTS.

There is an obscurity in the cases upon the subject of annual rests, and apparently inconsistent statements as to their object.

I have noticed one distinction, which has removed, to my mind, part of the difficulty.

In taking an account, the term *rests*, is applicable to two distinct classes of cases.

First,—To the case of a mortgagee in possession, or an executor *creditor*, having money of the testator in his hands ; there being no other debt :

And secondly,—To the case of an executor or other trustee called to account for monies received by him, to ascertain the annual, or other periodical balances in his hands.

As to an executor creditor it is settled, that in an account with him, as to his claim, rests shall not be made.

Robinson v.
Cummings,
2 Atkins 410.

"Mr. Cummings the defendant, being a bond creditor and made executor, in his account charged a gross sum for interest for 15 years, the period of his executorship. The Master allowed the charge. Exception, That he should have applied the assets as they came in, to pay off his own bond.

Lord Hardwicke said,—“The court never directs that an executor bond creditor should discharge by piece-meal the principal and interest of his bond.—He may discharge all other demands before his own. But where there are assets in his hands above all other demands, he must apply them to his debt, if sufficient to pay the whole, he is not compelled to take part.”

Next as to mortgages in possession.

2 Atkins, 533.
Gould v.
Tancred.

"In this case the general rule is recognized, that in taking the account of a mortgagee in possession, annual rests are to be made.

It is at the same time said that this is not the invariable rule. That it is often a great hardship on a mortgagee where the sum was large, and he could only satisfy his debt by parcels.

The following case will explain the subject and shew the rule fully.

Davis v. May,
Cooper's cases, 238.

"On a bill to redeem, it appeared, that the mortgage was granted 1793, the principal sum £700. From '93 to '99 the mortgagee received nothing for principal or interest, and the debt then amounted to £1000.

In '99 the Mortgagee was let into reception of the rents and profits. The rent exceeded the annual interest, so that by 1809 the whole interest as well the arrear in '99, as the current interest since, was fully paid; and the principal £700 remained alone due. Since 1809 to June 1813, the time of filing the answer, the mortgagee or his Representatives continued to receive the rents, which in each year were three or four times as much as the interest.

On an application to amend the minutes, the point was in what manner the account should be taken.

For the Plaintiffs, it was insisted, that from 1809, the annual excess of rent should be applied to sink the principal, and that therefore *annual rests* should be made.

Cited 2 Cases
from
Registers
books.

On the other side, it was urged, that the proper mode was to compute interest on the £700, from the date of the mortgage, and to ascertain the amount of rents received, and deduct such amount from the aggregate of principal and interest.

That the register had searched his book for 3 years past, and found ten decrees for taking accounts of mortgagees in

possession, in only two of which, (those cited for the plaintiffs) were annual rests ordered and not in the others, from which it was clear, that it was not the usual course of the court to direct annual rests, unless the case was extraordinary, and where the mortgagor would be materially injured without it. The register had also stated, that it was not usual to direct annual rests, except under special circumstances.

Names and dates, of the cases given in a note.

The Master of the rolls said,—His recollections of the form of decrees was the same, either decrees made annual rests throughout or not; there was no intermediate case. Here the special circumstances seemed to make the other way. Rests were not directed."

From these cases it is plain, that the making annual rests in case of a mortgagee in possession is not to increase the amount with which the receiver is chargeable, but to reduce his demand; and is nothing more than to carry into effect the rule of stating an account laid down by Lord Hardwicke, and sanctioned by our court, that monies coming to the creditors hands shall be applied first to extinguish the interest, and the excess to sink the principal, and of course has nothing to do with the charging any party with either interest, or compound interest. It is to this class of cases of annual rests, that the rule, that a Master may not make them without being directed to do so by the decree, alone applies.

"Decree of redemption, and the usual direction for an account.

Webber v. Hunt, 1 Maddock's Rep. 13.

Motion to amend the minutes, and for a direction under the circumstances, for the Master to make annual rests.

The Vice Chancellor said,—He had found a difference of practice among the Masters; some make rests without any specific direction in the decree for that purpose, and some do not, but merely totalize the principal, interest and costs, and the rents and profits.

The Master is not at liberty to make rests, unless directed to do so by the decree. Cites several cases. *Fowler v. Wightwich*, A. D. 1810, &c.

In *Feates v. Hambly*, it appears, that the form of the decree was,—“That an account should be taken of what should be coming due on account of rents and profits, to be applied in the first place in payment of interest and principal, and in sinking the principal, and the Master to make annual rests. (In the case as in *Atkins*, it is “in paying the interest, and then in sinking the principal.”) This is the proper form of the decree where rests are to be made, but rests can never be made by the Master unless specifically directed by the decree.

2 Atkins, 362.

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In the present case annual rests are proper, and the minutes must be altered accordingly."

All the cases cited to support this rule are cases of accounts with mortgagees in possession. And besides there are instances in which, in cases of the second class before distinguished, the Master has made rests without a direction in the decrees to that effect.

Second.—The second class of cases in which rests are made, are cases of an executor or other trustee called to an account for sums received; and in which the annual or other balances are ascertained, that interest may be computed, if he is to be charged therewith.

Earl of Lincoln, appellant, Poulton Allen, respondent. 4 Br P. C. 553. 2 Edit.

There are cases where annual rests was made without being directed by the decree. "Certain freehold estates having been left to the appellant's father, subject, so far as the personal estate of the devisor should fall short, to his debts, the executor filed a bill against the appellant, alleging a deficiency, and how it arose, and praying a sale of sufficient of the real estate.

The answer alleged misconduct and waste of the executor in administering; and that there was sufficient to pay the debts of the personal estate; and the appellant filed a cross bill to procure an account of the personal estate, debts, &c.

A decree of reference was made, 'to the Master to take an account of the personal estate, debts, legacies, annuities and funeral charges, reserving the consideration of the merits and costs till after the Master should have made his report.'

The Master reported, finding a balance in the executor's hands.—'And for the further information of the court, the Master in a schedule to his report, set forth an account by way of annual rests, showing the particular sums of the personal estate, which remained in the hands of the executors unapplied in a course of administration, at the end of each year from 1716 to 1748, which also showed what part of such unapplied sums are placed out at interest, and what remained dead in the executor's hands.'

When the cause was brought on, it was sent to the Master to review his report in not making a certain allowance to the executors, and the consideration of subsequent costs and further directions was reserved to the coming in of the report.

Upon an appeal to the House of Lords it was ordered, that after the word, "*consideration*," the words "of interest for the annual balance kept by the said B. Poulton in his own hands," should be inserted, and with this variation the decree should be affirmed."

So in this case,—“The cause came on for further directions upon a reserved question, whether the defendant should be charged interest for sums belonging to the estate of Moore the testator, and remaining from time to time in his hands. Newton v. Bennett, 1 Br. C. C. 359.

The decree was to take an account generally and to make a separate report of the estate of Moore, come to the defendant's hands. Master Holt made his separate report *making rests every year*, and stating a final balance of £1688 to be due.

And the question now was, whether he should pay interest for the sums from time to time in his hands. It was ordered that the Master compute interest upon the several rests in his report.” See Belt's Ed. note 2

Annual rests are sometimes directed to be made by the decree. And this in two sets of cases.—1st, where the question of interest is reserved expressly, or the decree is silent in regard to it.—And 2d, where interest is directed to be calculated.

The following is an example of the first set of cases.

“The mortgagee had been some time in possession, and the bill for an account and delivery up of the premises charged that he had been overpaid. The decree directed an account of what was due on the mortgage for principal and interest; and of money laid out in necessary repairs of lasting improvements; and also to take an account of the rents, produce, and profits of the estate received by the defendant, or by any person by his order or for his use, or which, without his wilful default, might have been received thereout.—And that the said Master, in taking the said accounts of rents and produce of the mortgaged premises, do *make annual rests*. And, the consideration of interest and costs were reserved till the coming in of the report. Quarrel v. Beckford, 1 Mad. Rep. 269.

On further directions, the chief question was stated by the Vice Chancellor to be that of interest.—That the fact must be taken to be that before Trinity Term 1796, the mortgagee was overpaid by the sum of £1572, from which time each annual receipt ought to have been paid over, (deducting the current expenses of the year.) In this case the court that framed the decree have decreed annual rests, and have reserved the question of interest. I do not say that that has decided any thing on the subject, but it has put it in a course, and in a state, for the determination of the question of charging this mortgagee with interest, if it turned out to be that he was overpaid. And it was held, that the defendant should be charged interest, at the same rate as an executor having balances in his hands, viz. 4 per cent.” This case is properly arranged under the

second class, as the annual rests, after the defendant was fully paid, operated to charge him exactly as an executor or other trustee.

It should be noticed, that the reservation of interest in a decree amounts only to this,—that the court will not then decide the point ; not implying, that if not reserved, the Master may compute it.

16 Vesey, 97.
cited in
Schiefflin v.
Stewart, 1
John. C. C.
625.

The decree in the case of *Lady Ormond v. Hutchinson*, cited by Chancellor Kent, amounts to nothing more than a reservation of interest.—The terms are, “to take an account, &c. with annual rests, without prejudice to the question, whether the defendant ought to be charged with interest, or not.” The language of the Vice Chancellor in *Quarrel v. Beckford* shows, that this provision was not necessary ; as the direction as to annual rests decided nothing upon interest ; and the clause has therefore only been inserted from greater caution.

Next.—Where the decree directs rests, and is silent as to interest, it is impliedly reserved ; and the Master cannot compute it.

Tibbs v. Car-
penter, 1
Madd. Rep.
293.

“On a bill against an executor by parties entitled to a share in the residue, a decree was made for the usual accounts, and on further directions upon the coming in of the report, it was ordered that the Master should inquire what balances were in the executor’s hands, on account of their receipts and payments set forth in the schedules to his report, at the end of one year after the testator’s death, and *making annual rests*. Further directions reserved. The Master set forth the balances in the executor’s hands, which in each year from 17 97 to 1811, with the exception of 4 particular years, were very considerable.

The Vice Chancellor stated, that one of the questions was, as to these balances and interest ; and entered at large into the point, whether the interest should be simple or compound ; and decreed simple only.”

11 Vesey,
117.

So Lord Eldon said, in *Raphael v. Boehm* that in general cases rests are made in order to see whether interest is to be charged or not.

1 Coxes
Cases, 138.
Lord Chan-
cellor.

“In this case it is extremely plain, that the Master having reported so much money constantly in his hands (in consequence of the directions to him to *make rests* of the balance in Hallet’s hands at the end of each year, and which was done with a view of ascertaining the extent of his misconduct) and Hallet having continued to pay interest on the specialty debts, without applying the money, this would fix him with interest without any further explanation.”

The second case is, where annual rests are directed by the decree, and interest is also ordered to be computed.

I have not satisfied myself as to the true construction of such a decree. The difficulty I have found is, whether these combined directions necessarily imply the allowance of compound interest.

The case of *Raphael v. Boehm* contains much but not decisive information on this head. 11 Vesey, 92.

In the first place, the decree was, "that the Master should compute interest on all sums of money received by or come to the hands of the defendant from the time he received the same respectively during the time the same continued in his hands, and that the Master do in such computation make half yearly rests."

Under this order Master Holford computed interest for the time of possession of each sum on hand, as the same was varied by payments or additional receipts; and at the end of each half year, added the total of interest to the total of principal, and computed interest on the aggregate sum till it was varied by the next payment or receipt. Upon exceptions, the Lord Chancellor sent the report to Mr. Cox to be reviewed, and to state the practice.

Mr. Cox stated as follows,—That he conceived the meaning of a direction to take an account in any particular manner (as for example, by computing interest on sums received and paid at any given rate, either from the actual time of every such receipt and payment, or from the end of any given time after such receipt or payment, or in any other particular manner) and to make yearly or half yearly rests in the taking of such account, is, that the accounts should be taken in the manner prescribed up to the end of each year or half year, and that a balance should then be struck, and that such balance should be considered as the balance of an account then settled, and should be carried down as the first item on the proper side of the next year's or half year's account. The consequence of which would be, that whenever any calculation of interest is directed to be made upon the sums so received and paid, the balance struck will include the balance of interest as well as of principal, and in computing interest on such balance as an item in the account of the succeeding year or half year, such computation will include a computation of interest upon interest.

He further stated that the general understanding of the Masters with regard to a decree directing rests to be made in taking an account, was, that such rests were to be made with a view of computing compound interest."

Mr. Cox's language is certainly very general, and appears to contain this rule,—That in taking an account, whenever the computation of interest is ordered upon sums from a fixed period, and annual rests also directed, compound interest is to be charged.

But undoubtedly this cannot be taken literally. It must depend upon the phraseology of the particular decree. Annual rests being clearly nothing more than a stoppage at the close of each year to shew the state of the account, it is plain, as was before shewn, that they do not imply of themselves, the charge of either interest or compound interest; but are merely to facilitate the computation of interest, if allowed by the court, or to guide its judgment in allowing it. Then the decree may either direct the computation of simple or compound interest, and it must necessarily be a question of construction, where it is not expressed unequivocally, which is intended to be charged. Now in *Raphael v. Boehm*, it was plainly compound interest, because it ran, *that the Master compute interest on all sums come to the defendant's hands for the time they continued therein; and that in such computation he make half yearly rests.* Here the rests were referable to the *interest* to be computed. But if the direction for rests referred to the account merely, to the mode of stating it; as if the decree ran, *to charge interest upon the annual or other periodical balances in hand, and in stating such account, to make annual rests,* I should unhesitatingly conclude that the court did not intend to charge compound interest, or intended to leave it open for its own decision, upon seeing the amount of yearly balances, and the other facts exhibited by the report.

4 Dow's Rep.
209. Decree.
229, 230.

The case of *Stackpole v. Stackpole*, clearly shews that this view is correct.

It is apparent from the report that nothing more was intended to be charged than simple interest; and the order runs, "*that the full legal rate of interest be charged on the sum remaining undistributed against the administrator, making annual rests in the accounts, and charging interest on the annual balances.*"

Although the Master may make annual rests, he cannot charge interest without being authorized by the decree.

Mrs. Case,
1820.
4 Johns.
Rep. 447.

It is true in *Smith v. Smith*, the Chancellor, in a case where the decree was general, viz. "to take and state an account touching the trust of the guardian, and the monies received and disbursed, and the balance which on such account should be

found due from either party to the other," inclined to think the question of interest was placed before the Master by the general terms of the order of reference.

But with respect, this is contrary to the principles and rules of the court. It was formerly the doctrine of the court, that interest unless directed by the decree, or reserved, could only be obtained upon a rehearing.

Herle v. Greenbanks,
Dickens, 370.

Afterwards it was allowed on further directions, upon the coming in of the report.

"The executor had used the testator's money in trade, and made great profits. There was a decree to account; and this gross misconduct appearing on the report, interest was prayed. Lord Thurlow adhering to the old technical rule, thought, as there was no reservation of interest, it could be given only upon a rehearing. Upon that it was objected, that there was no demand of interest by the bill, nor any circumstance upon which the right can arise. Then upon further directions, the injustice of the case was again pressed upon him, and the absurdity of the rule to refuse interest, when by the report it appeared proper, and could not appear before: and at last the Chancellor did order it upon further directions, though interest was not reserved."

Margerum v. Sandiford,
cited 2
Ves. Jun.
162.
Cruise v. Hunter.

So in *Cruise v. Hunter*, Lord Rosslyn said,—“In respect of the objection in point of form, upon a distant recollection of the practice, I thought that if interest was not reserved or given by the decree, it was matter of rehearing, being a question to be made in the cause. I had taken it to be the subject of rehearing, the decree being incomplete in not having pronounced upon that which makes a substantial point of the case. I am well satisfied with the authority of *Margerum v. Sandiford*. I think there can be no objection to giving interest upon farther directions after the report. Upon farther directions the court may add to the decree.” But it was decided, it could not be given on a petition. A decree cannot be varied on petition.

Ante.

If the court by the old rule was precluded, in consequence of the omission in a decree, from giving interest till that decree was varied on a rehearing, and even now can only give it by the decree on farther directions, how is it possible, that the Master can do what the court can not? If a decree gives it, interest cannot be computed.

Again,—There are several instances where the Master has not computed interest, (the decree being silent) in cases, in which if properly brought before it, the court would certainly have

given it, or afterwards has given it; though it does not appear that the claim was made.

4 B. P. C.
553.

The before cited case of *Lincoln v. Allen*, is a strong instance of this.

There the Master found in his report, what sums remained dead in the executor's hands from year to year, and stated this in a schedule for the information of the court, yet did not attempt to charge interest.

And *Lastly*, the following case in my opinion cannot be understood except as a positive authority, that the Master in the case supposed, cannot charge interest.

*Bruere v.
Pemberton*,
12 Vesey,
386.

"The usual decree was made for carrying the trusts of the will into execution, directing the accounts, &c. The Master disallowed the claim of the executor for a commission upon a special ground. The effect of this was, that a balance of above £2000, was to be accounted for by the executor. The parties insisted, that the executor should be charged with interest since the death of the testator. The claim *was allowed* by the Master; and *an exception to the report upon that point was allowed without prejudice to the question as to interest* to be paid by the executor. A petition was presented, praying that the executor should be charged with interest upon the balance in his hands from the death of the testator. The decree did not contain any direction as to interest. This petition was argued; and the Lord Chancellor upon the particular circumstances, dismissed the petition, refusing to give the interest. He also stated, that if it was necessary to determine the point of form there was much doubt, if it could be brought on by petition, citing *Cruise v. Hunter*." Now in this case the exception was allowed; plainly not for its substance, the allowing of interest, because it was done without prejudice to that question, and that question was discussed upon petition. Why then was it allowed, unless because the Master had no right to give the interest under that decree. And as to the objection of the inconvenience and expense of going over the whole account again, as it will be varied by the allowance of interest, that has no weight, if the account is taken either by stating each year's current receipts and payments, and shewing the balance, independent of the balance of the anterior year or by striking an annual balance including that.

In the one case, the interest will be computed on each annual balance down to the date of the report; and in the other, from year to year; will be taken into a separate column and totalized. In neither will the computation be burthensome.

The court is very frequently unprepared to decide the question of interest at the hearing, or at least can do it much more advisedly, when the circumstances of the party's conduct, and the sums retained by him are exhibited by the investigation before the Master.

3d MODE OF STATING AN ACCOUNT WITH INTEREST.

The mode of stating an account, in which interest is to be cast, was laid down by the Chancellor in an early case before him, *Jackson v. The State of Connecticut*, viz. that when partial payments have been made, the payment is to be in the first place applied in discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal due. If the payment be less than the interest, the surplus interest must not be taken to augment the principal, but the interest continues on the former principal, until the period when the payments taken together exceed the interest due; and then the surplus is to be applied towards discharging the principal.

Jackson v. State of Connecticut,
1 John. C.
Rep. 17.

In *Sloughton v. Lynch*, the subject was brought before him on exceptions to the report of a Master. He stated that the exception went to the whole mercantile usage of computing interest on merchants' accounts. That the correct mode of crediting payments was the one above stated (in *Jackson v. the State of Connecticut*), that he had always understood and observed, that the usage among merchants was different; that he had no doubt the parties throughout their accounts had followed the mercantile usage, and as far as any partial calculation or settlement in respect to each other had been made, they had followed that custom. He had a right to presume, that the Master had sufficient evidence of their practice, to warrant the mode he had adopted. When the calculations came in, they were never questioned on this point, and that he thought the parties concluded. Even without this acquiescence, he was not prepared to say, that the mercantile practice ought to be questioned on a settlement of accounts between merchants themselves. Their running accounts are kept, entries made, and balances from time to time adjusted upon their own invariable usage as to their mode of keeping accounts." That mode is to compute interest upon the debits and credits respectively from their dates to the period of making up the account or other given time.

2 Johns. C.
C. 213.

It is observed by the Chancellor, that it is susceptible of mathematical demonstration, that if the principal of a debt is left upon interest, and interest is computed upon payments as they are successively made, a debt will in the course of a few years (the time shorter or longer according to the rate of interest) be wholly extinguished by payments of interest, without paying a cent of principal. That the usage was not very material where there were long mutual credits, because the rule operates equally upon the credits of each party, and if the balances are nearly the same, the result is equal.

No. 30.

In the Appendix an account is inserted which was drawn up when the case of *Stoughton v. Lynch* was preparing for the court of errors to shew that by the mercantile mode, a debt of \$1000, would be paid off in 21 years by payments of interest at 7 per cent. regularly, without paying a cent of principal.

I am not aware of any case, in which the question upon the mercantile usage nakedly, has been before the court.

Even if the decree directs that interest be computed upon credits, as well as upon debits, the mode of stating the account should be the same as that of *Jackson v. The state of Connecticut*.

29 Sep.
1815.

The direction is to be considered as meaning only, that when the accounting party happens to be creditor, the interest is to be computed in his favour. "In the case of *Barrow v. Rhinelander*, the decree was, that the defendant who was the confidential clerk of the plaintiff's assignor, be credited with all monies loaned by him to *E. P.* or paid on his account between the day of and the day of together with interest on such sums respectively from the respective times they were so advanced, and to the time of taking the account; that he be credited also with his wages at the rate of \$500, a year, together with interest on such sum as was due for such wages at the end of every year, to be calculated from the close of said years respectively to the time of taking said account, or until the same was paid. And that the defendant be charged with all monies received by him from the said *E. P.* or his property or debtors, &c. and all monies paid by said *E. P.* &c. for and on account of the defendant with interest on the respective payments and receipts from the time they were severally made or received, to the time of taking the said account. And there was a similar direction as to interest in each of several provisions in the decree as to particular charges against the defendant."

The Master under this decree, stated in one schedule all the proper items of credit to the defendant, and in another

all the proper items of charge against him, without carrying any interest into such schedules.

In a third schedule he set forth an interest account, in which as stated in his report, he considered the several sums credited to the defendant in the nature of loans by him at interest, and the sums charged against him as payments thereon, until the period at which the defendant became debtor to the complainants, from which period he had considered the sums charged against him as monies received, on which he was to pay interest, and the credits as payments thereon, and that in both cases he had applied the payments respectively first to discharge the interest, and the excess, if any, towards discharging the principal. To this mode of stating the account an exception was taken, insisting that the Master should have credited the defendant with interest on the several items of credit from their respective dates to the time of making his report, and debited him with interest on the several items of debit, in the same manner.—And this exception having been argued, was disallowed.”

7 Decem.
1818.

In the case of *Rogers v. Ross* where the decree was similar as to interest, the same mode was pursued by the Master, and submitted to. In Ch'y. 13.
May, 1820.

It is apparent that to attain complete accuracy in stating an account upon this principle, and to avoid charging the defendant with interest for a day, on a cent more than he has actually in hand, it is necessary to make a rest at every credit exceeding the interest then due, however trifling such excess may be.

But Lord Hardwicke who lays down the general rule, has said, that the Master need not stop to make such application, for every small excess of the payment. I have before shewn, that an executor creditor is not obliged to apply monies he possesses less in amount than his whole demand, in *extinguishing* a part; and that the court now rather holds as a general rule, that mortgagees in possession *need not* apply the excess of the annual rents against the principal. I am far from thinking therefore, that it is to be considered a standing rule of our court, that every excess however small, must be so applied.

Gould v.
Tancred, 2
Atk. 533.

There are two grounds upon which an accounting party is charged with interest, (exclusive of the mere idea of punishment).

First, that he has made interest himself; next, that he has deprived the creditor of it, by not paying him the fund, or putting it in a situation to yield interest. Upon the first suppo-

sition, of course the party should have interest stopped at the precise moment he pays away the principal, which produces it. But upon the second, it is plain in the first place, that the party receiving can rarely begin to get interest from the moment of reception ; and in the next, that the reception of a debt by very small portions is inconvenient, because he cannot put them separately out at interest. These I conclude are the considerations which have led the court in the cases noticed, not to give the debtor the advantage of an instantaneous application of every small excess of his payment beyond the interest. We have seen that in cases of mortgagees, even when done, it is only done annually.

Ms. 17 Jan-
uary, 1820.

On the other side undoubtedly, care must be taken, that the debtor is not burthened with interest upon a heavy sum for a period of time, in the early part of which, he paid the whole or a large portion of it.

In the case of *Nestell v. Nestell*, the decree was ; " that in stating the said account the said Master charge the said defendants with the amount of all monies they or either of them shall have received belonging to the complainant at the several times at which they shall have received the same, with interest thereon from that time until the date of his report," and the account was stated with rests to deduct the excess at every time when such excess appeared.

In the Appendix, No. 31, the account in that case is stated upon this principle, and in No. 32, upon a rest made quarterly for the same purpose. There are eleven rests in the first statement as numerous as would usually occur in a year, and the difference is only £ 17, 32. The loss of the debtor by this mode is by paying interest upon the sum he has parted with for the residue of the quarter after his paying it away.

I conceive therefore that it would be a convenient rule, consistent with the principles of the court, if the Master should in general make a rest for the purpose of sinking the principal quarter yearly ; excepting indeed in a case of a large payment, where considerable injustice would be done if the stop was not immediately made. And I think the Master has the power to do this without the express authority of the court, under the qualification of the general rule which Lord Hardwicke sanctions.

It need scarcely be observed, that if the payment does not equal the interest no stop is necessary to deduct it, because the interest goes on upon the same principal. In such case, it may be advisable merely to add up the interest at the close of the quarter to shew it is less, and proceed to the end of the next quarter, or to a subsequent one where there is an excess.

Decrees against executors or other trustees charging them with interest upon sums from the moment of possession are severe, and only made in cases of marked misconduct, or employment in trade, when it may reasonably be supposed the money is immediately turned to a profit. So Lord Eldon says in *Raphael v. Boehm*, that the part of the decree relative to computing interest from receipts was novel; but the practice is to fix some time at which the party is to be first charged with the principal, and then upon general convenience to make some rests, and to call upon the Master to compute interest upon those rests.

The usual course where the party is charged with interest is to direct it to be computed on annual balances. In such a case the most convenient mode is to state the account of each year separately and carry the interest on its balance to the date of the report, or to some other proper period, as the date of the payment of a large part of the debt into court or otherwise.

As in *Mossely v. Ward*, 11 Vesey, 581.

If the current receipts of each year exceed the current expenditures, there can be no objection to this mode. If the balance is the other way in a particular year there are several modes of stating the account. *First* by stopping the whole prior account interest and principal at that date, and striking a fresh balance, which would be a balance of interest merely, or of principal after discharging the total interest, according to the amount of such credit balance.—*Secondly* by carrying such balance to his credit, as the other yearly balances are to his debit, and giving him interest on it to the close of the account, and *thirdly*, by considering it as an advance out of his own funds, and allowing him interest until repaid, either until the exact date of such repayment, or until the next annual balance which is sufficient. The *second* mode is not according to the habit and rules of the court. The *first* must undoubtedly be adopted where the credit balance is very large, in some proportion to the total amount then due. The *third* appears to me to be most proper and convenient in the generality of cases, where the balance is not large; and where it soon becomes extinguished.

The true view of the subject appears to me to be, that the court considers that at the end of each year the balance upon the year's transactions is the sum due upon a stated account, which the party is then presumed to put out at interest for the benefit of the estate. It is not to be supposed that a large sum would be called in when gaining interest, for the purpose of paying a trifling debt. It is therefore natural to regard it as

paid out of the party's own funds, and to allow him interest until repaid. He of course would apply future sums received first to pay himself.

There must be something left upon this subject to the discretion of the Master according to the circumstances of each particular case, and which no general rules can be laid down to direct.

If the account is made up by carrying out only the interest upon each yearly balance for one year, there can be no difficulty of the nature of those suggested. The inconvenience of this method is, that if any error is found in a particular year, it renders necessary the correction of the calculation of interest for every subsequent year, because it alters the future balances.

4th. OF INTEREST SIMPLE OR COMPOUND CHARGEABLE BY REASON OF THE MISCONDUCT OF THE ACCOUNTABLE PARTY.

Lynch v. Cappy, 2 Ch. cases, 35.
1680. *Cartwright's case*, cited 2 Ch. cases, 152.
1683.
1 Vern. 196.
Ratcliff v. Graves,
1 Vern. 196.

2 Vern. 548.

Adams v. Gale,
2 Atk. 106.
and *Child v. Gibson*,
ibid. 603.
1 Br. C. C. 362.
See *Belt's*,
Ed. 5. n. 2.
Ibid. 375.

Ibid. 375.

Treves v. Townsend,
1 B. Rep. 384. and 1
Cox's cases,
5).

At a former period of the court, a singular rule in relation to interest prevailed—that an executor loaned out money at his peril, and was liable if it was lost, but was entitled to retain the profit. This doctrine was held by the House of Lords in *Gardner v. Cartwright*, and is stated to have been decided in above forty cases.

The Lord Keeper *North* however shortly after these cases, adopted another rule, and charged an administratrix with interest for monies employed by her in trade. And the same doctrine was held in *Lee v. Lee*, in 1706.

The old rule however was afterwards acted upon by Lord Hardwicke. Lord Thurlow had the point before him in a variety of cases, and established the principles now recognized by the English Court.

In *Newton v. Bennett*, the first case before him, he charged an Executor with 4 per cent. on the balances in his hands which he had used with his own money in his trade, and there was evidence that the probable profits of that trade was 5 per cent. And in *Perkyns v. Bayntun* where the party had mixed the fund with his own money, and laid the whole out in Government securities and made interest, and the Master stated he could not ascertain what profit, he charged him at the same rate.

Afterwards he varied the rule, and where the money had been employed in trade, offered an enquiry to the defendant, whether 5 per cent. had been made in the particular trade, which was declined, and he then affirmed a decree of the Lord

Commissioners giving 5 per cent. upon the monies retained in hand. He stated that he never gave more than 4 per cent. on the simple case of detention, but that he thought that a case in which *five per cent.* should be given.

Without detailing the numerous subsequent cases upon this point, I shall only cite a very elaborate one before the vice Chancellor of England, which distinctly shows the whole doctrine as it is now settled in that country. In this case as before stated, Executors were called to account, and upon the report it appeared, that large annual balances were in their hands; and the Vice Chancellor said there was no evidence to shew any necessity for keeping such balances in their hands.

Tebbs v. Carpenter,
1 Mad. Rep.
290.

There was a direction in the will to put out the overplus in the 4 per cents.; and it seems a naked case of unwarranted retention, with such a direction from the testator. Compound interest was claimed. The Vice Chancellor said, it was a point of great importance that the rule should be clearly ascertained, and proceeds to comment upon the several cases.

As to *Raphael & Boehm*, he says, Lord Loughborough's decree was very severe, for he directed the account to be taken from the moment of the testator's death, and interest to be charged upon all the sums received; and rests to be made half yearly upon the balance, including intermediate interest, so that double compound interest was given. Lord Eldon did not approve of the decree in that respect, and said, it was expressed in terms that were never inserted, and which he hoped would never again be found in any decree; but he agreed in the propriety of giving compound interest. When the case was before Lord Erskine, he said, 'that it did not depend upon the general rule, as it relates generally to the administration of assets, but upon the special rule prescribed by this particular Will, by which accumulation is pointed out.' That *Raphael v. Boehm* was the only case cited in support of the claim of compound interest. No case had been stated previous to that, where compound interest was given. Two subsequent cases had occurred, *Dornton v. Dornton* and *Ashburnham v. Thompson*. He then states *Dornton v. Dornton* from the Register's book. The will directed an early disposition of the testator's property, and an investment in the public funds; the interest to be allowed discretionally for maintenance of his Nephew, and the surplus if any to be vested also, when it would purchase £50. The Master of the Rolls there considered the direction to accumulate, as imperative as in *Raphael and Boehm*.

11 Vesey, 92.

13 Vesey.
402. 412.

The Vice Chancellor extracts the order from the Register's book, which was in substance, that interest be computed by the Master on the balances from time to time in the defendant's hands at the rate of 5 per cent, to a certain amount, and 4 per cent. for the residue of such balances. He then says, Compound interest it is observable was not directed.

13 Vesey,
412.

He states also *Ashburnham v. Thompson*, that the executors had kept the money for 20 years, and employed it for their own advantage. It was pressed that compound interest should be given, but the master of the rolls said, "there was no ground for computing interest upon the balances out of the common way." The Vice Chancellor adds—"In none of the cases previous to *Raphael v. Boehm* was compound interest given." He then cites, and shortly states the decision, in *Perkins v. Baynton*, *Newton v. Bennett*, *Forbes v. Ross*, *Littlehales v. Gasgoine*, *Brown v. Southouse*, *Franklin v. Frith*, *Seers v. Hind*, *Pietz v. Stace*, *Pocock v. Redington*, and *Roche v. Hart*, and adds;—

1 B. C. C.
275. Ibid.
358.
3. 430. 3. 73.
Ibid. 107.
433.

1 Ves. jr. 224
4 " 620.
5 " 794.
11 " 58.

It appears therefore from a view of all the authorities that a distinction has been taken, as in every moral point of view there ought to be, between *negligence* and *corruption* in an executor. A special case is necessary to induce the court to charge executors with more than 4 per cent. upon the balances in their hands. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent, yet if there be nothing more proved in either case, the omission to lay out money amounts only to a case of negligence, and not of misfeasance. Is this then a case of negligence or of misfeasance? Have these executors made any use of the money to their own profit or advantage?

It appeared that an agent was employed who alone possessed the balances, which the Vice Chancellor, said, "shewed that the executors did not in fact derive any benefit or profit to themselves, and he gave but 4 per cent. interest."

1 Jacob and
Walker, 566.

So in the case of *Crachelt v. Belhuns*, the testator directed his personalty to be invested in the public funds for the benefit of his family—he died in 1799, leaving £2600, 3 per cents. The executor sold out the whole at different times. He had always kept considerable balances in his hands although it did not appear there were any outstanding demands, no debt having been proved under the decree except that of the plaintiff. He refused to pay the plaintiff, alleging he was not satisfied with the justice of the claim. He further insisted in excuse for selling out the stock, that there were de-

lands outstanding sufficient to exhaust the whole. It appeared he had in his hands £1130 in 1802, and a larger sum at all times down to 1811, when he was compelled to pay in to court, the sum in hand.

Under these facts it was strongly urged that *five per cent.* interest should be charged, and annual rests made.

The Master of the Rolls said,—“That upon the authorities referred to in *Tebbs v. Carpenter*, he thought it a case that comes within the rule of charging *five per cent.* interest, but upon the same authorities, not a case for rests. For that purpose the court has always expected the case to go much further.”

There may however be circumstances attending a case of mere detention which will induce the court to charge 5 per cent.; and such I consider the case of *Mosely v. Ward*, in which there was not any profit by employment, but the executor was charged with 5 per cent. upon his annual balances, because he had withdrawn the fund from a situation in which it had yielded that rate of interest.

I shall only advert further to the rule as stated in some of the cited cases, where the party has made a profit by employing the fund to his own use.

Treves v. Townsend was of this description.—£1936 came to the defendant's hands. The Lord Chancellor said, it was established, he had employed it in trade, and allowed 5 per cent. upon it, offering the defendant a reference to shew that the profit was less.

In this case the testator had directed his executors and trustees to invest the residue in the purchase of lands, or upon heritable or personal securities at such rate of interest as they should judge reasonable. They loaned large sums to one of themselves, upon a bond at 4 per cent. The testator had loaned him money at the same rate. They admitted that 5 per cent. might have been made by loaning on government securities, or mortgage. The executor had used the borrowed money in his business in common with his own, 5 per cent. interest was claimed.

Lord Chancellor.—The question whether an executor shall be charged with interest on the assets retained in his hands, turns on this, viz. whether the fund has been so kept for any other purpose than that of discharging the growing claims upon it. It frequently may be necessary for an executor to keep very large sums in his hands; especially in the course of the first year after the decease of the testator. After that, if the court observes that an executor keeps money in his hands

11 v
581.

Ante,

Forbes v.
Ross,
2 Cox. Cas.
113.

without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust; the consequence of which is that the court will charge the executor with interest; and usually at 4 per cent.; but that is only in cases where it does not appear, that the executor has actually made interest of it, or *what rate* of interest has so been made: but if it can be distinctly made to appear that a greater rate of interest than 4 per cent. has been made, there the Court will not let him make benefit to himself, for he shall account according to the rate of interest made. It has very frequently happened, that from the manner in which the fund has been used, it is totally impossible to tell what interest has been made of it; and it has long been decided that 4 per cent. is the proper rate to be charged under those circumstances. Whether this was a good rule to adopt, I will not discuss at present, though I confess I think it rather doubtful; but it is now the constant course.

He then decided that 5 per cent. should be allowed, on the ground of the trust being executed in favour of one of the Trustees himself, who could receive no benefit from it; and the admission that 5 per cent. could have been made. That where that was admitted it was impossible for a trustee to avail himself of the money in his hands, by paying a smaller rate of interest for it, than he could have got by other means."

I consider this case as correctly exhibiting the rules of the Court except in one position, in which its doctrine has unquestionably been changed, viz. that where interest has been made by employment, but the rate cannot be ascertained, 4 per cent. only is chargeable. If Lord Thurlow means this precisely, (of which there is some room to doubt,) the rule is altered, and 5 per cent. is given. *Treves v. Townsend*, *Pococke v. Reddington*, and *Piety v. Stace*, shew this conclusively.

Post.

5 Vesey, 784.

In *Pococke v. Reddington*, The executor invested the funds of the estate in stock, which he afterwards sold out, and loaned it to his friends, who failed. Upon exceptions to the report, the Master of the Rolls said that he must answer for it, and for what he might be supposed to have reasonably made, and if he made more, he *must answer for that too*. That the cestuique trust had an option either to make him replace the stock (accounting for the dividends) or to affirm his conduct, and take what he had sold it for, and charge him with 5 per cent. interest, or if he had made more, they might charge him with that. This trustee had made nothing, but lost the whole; and they must therefore have either interest at 5 per cent. or the dividends.

So in *Piety v. Stace*, the Executor had called in part of the property which was out on security, and had used it generally in his own trade, and in various transactions in the public funds, paying the dividends only to the person entitled for life. He had made a profit. 4 Vesey, 620.

The Master of the Rolls said, any gain must be for the cestuique trust. That for every shilling he got by the transactions he should pay interest at the rate of 5 per cent. for every minute it lay in his hands. I suppose he imagined he might make an advantage to himself, if he could do so without disadvantage to the *cestuique trust*, which is the notion of trustees; but he must pay for that. An account was directed of all the defendant had made with interest at 5 per cent. upon the balances in his hands.

The following case illustrates the rule that the party has an election to take profits or interest. The intestate, carried on at his death, a Cotton Manufactory in partnership with others. He left a widow, and infant children. The widow administered, and upon advice, concluded to continue the property of the estate in the trade as it was profitable, and that the children, when of age, might carry it on. It was conducted under the same firm, and with some variation in the terms only.

Heathcote v. Hulme,
1 Jac. & Walk. 130,
and *Burden v. Burden*
there cited.

The partnership was some time after dissolved, but no settlement of accounts took place except so far as the interest of one of the partners was concerned. He was settled with. The profits were diminished after this.

The bill was filed by the children of the intestate, insisting that they were entitled to an account of the profits down to the dissolution, and to interest at 5 per cent. upon their shares since. The *Master of the Rolls*—The infants have a right in the account of that property of the intestate, that has been embarked in trade, to an option of taking either the interest, or the profits that have arisen from it. The general right of the plaintiffs to call for the account, is not questionable; the only question is what are the limits of that right. Is it variable, and may they take profits for one period, and interest for another, or must they determine once for all, and either take interest for the whole time that the trade has been carried on, or profits for the whole time?"

He determined, that the party had a right to judge which mode of accounting would be most advantageous to him, and to that he must adhere. That the dissolution did not make such a break as to vary the general rule; the capital of the estate continuing to be employed as before in the trade.

That there might be circumstances that would be sufficient to divide the period during which the trade was carried on. Circumstances might come to the knowledge of the executors which would render it unconscientious to continue the property longer in the trade; they might embark it in a new trade. —“ I do not say what would be the effect of such occurrences; it might then be argued that it was a perfectly new concern, and gave to the *cestui que trusts* a new right, to adopt or to relinquish it.”

He held that the plaintiffs were entitled to an account of the profits, for the purpose of ascertaining whether that or the interest would be most beneficial to them.—And a decree of reference for that purpose was made.”

From these cases, I think the English rules appear clearly to be, that an executor for mere detention of the monies of the estate, is chargeable with interest at 4 per cent. only. That when he has made a profit, he cannot retain it for himself, but the estate shall have it, and an inquiry as to its amount will be given. If the profit cannot be ascertained or the inquiry is waived, the court gives but 5 per cent. upon the sums or balances chargeable to him. But if he has made no profit (as in *Pococke v. Reddington*) and has been guilty of the same misfeasance, he is chargeable with what the court considers might reasonably have been made, viz. interest at 5 per cent. upon the amount received by or chargeable to him. That misconduct may lead the court to charge 5 per cent. even in a case of mere detention; but this is upon the fact that by such misconduct, that rate of gain has been *actually* lost to the estate; not upon a supposition, however probable, that as much might have been gained. And lastly, that a case may be so circumstanced of such gross violation in an executor of duty imposed upon him by the Will, as to lead the court to allow compound interest; but it is singular, that in the whole range of English decisions upon the unwarrantable conduct of executors in all varieties, there is but a solitary case giving compound interest, and that placed by the court upon the peculiarity of the trust.

Such are the English rules upon this subject. Our court has gone one step further.

“ In *Schiefflin v. Stewart* the bill was by an administrator to settle the estate, to account, and to pay over the balance. It appeared on the report, that he had mixed the monies of the estate with his own private property, and had employed them in his trade. The Master charged compound interest: An exception was taken, which the Chancellor overruled. He states that the allowance of compound interest is often essential

See *Roche v. Hart*, 11 Ves. 58.

1 Johns. Rep. 610.

to carry into complete effect the principle of the court, that no profit or gain shall be derived to the trustee from his use of the trust funds. That there were cases, in which, in order to reach the profit when it is not otherwise ascertained, they adopt the very rule of computation contained in the report. He cites *Foster v. Foster*, *Raphael v. Boehm*, and *Dornford v. Dornford*.

The Chancellor then makes a statement, to shew the great profit which the executor would have gained by charging simple interest only. In July 1805, he had on hand \$33,000. If he received by July 1806 the simple interest only \$2310, he would have the use of it for 9 years (the time of taking the account) free of interest. The next year he received another year's interest, and would then have on hand \$4620 for eight years for his own use, and so on.

Lord Eldon in *Raphael v. Boehm*, makes a similar statement.

The Chancellor further shews, that by the civil law there was an increase of interest for the conversion of money to the Tutor's own use."

It is to be observed, that the three cases of *Newton v. Bennett*, *Foster v. Foster*, and *Dornford v. Dornford*, which the Chancellor inclines to think were cases of compound interest, were clearly not so, as appears by the statement of the Vice Chancellor in *Tebbs v. Carpenter*.

In *Manning v. Manning*, the executors admitted they had applied the money to their own use, simple interest alone was charged. The point however does not seem to have been much litigated.

It is of great importance that precision in the rules of the court upon this subject should be attained.

I conclude from the authorities, that in cases of employment, the question always is, what profits has the party made.

If the executor has invested the estate in a particular speculation or concern, the party may trace out the profit made by the employment and have the whole benefit to himself. In such a case as long as the fund continued in operation, by revesting returns, no interest could be allowed, because the profits would be in lieu of it. If the speculation was wound up before the account was taken, the aggregate sum of the original fund, and the profits accrued, would be chargeable; and then the question would be whether interest should be chargeable on the original capital only or on that aggregate sum. From *Piety v. Stace*, it would seem, interest would be given upon the whole, which would be

something like compounding, as interest would be given upon the produce as well as the principal.

If the gain was admitted to be equal to compound interest, that must be accounted for, and where there has been confessedly some profit, which is not ascertained, or would be very difficult to ascertain, our court, as before shewn, has inclined to allow compound interest. But if the accounting party was to shew that the profits of the trade did not amount to that, it would not be possible for the court, I conceive to grant it, particularly under *Treves v. Townsend*. It is true Lord Thurlow's principle in that case is varied, and the English court would not now admit the defendant to shew a gain less than 5 per cent. *Pococke v. Reddington* gave 5 per cent. upon the value of the fund where the whole was lost, of course not less than that would be given, although the speculation yielded less than 5 per cent.; but then it is upon the original principal merely. This addition of one per cent. the court seems to have considered as a sufficient punishment upon the executor for his misfeasance in the naked case of employment in trade where there have been no profits, and as a reasonable supposition of profits where they are not got at.

The statement of the Chancellor Kent and Lord Eldon is undoubtedly correct, admitting the Executor to have uninterruptedly made his interest upon the yearly amount received by him, for interest. But the principle of the English court certainly is not, that in order to reach unknown profits, it will suppose as a general rule, that they are equal to compound interest upon the sum employed. But the principle is that the actual profits shall be accounted for, which may be to that amount or less. And that if the party does not choose to go for them, or cannot trace them, he can have but *five* per cent. upon the original sums chargeable.

It may be useful to make some statements to shew the effect of charging compound interest.

Compound interest at 7 per cent. will double a sum in ten years and about ninety days. The gain beyond simple interest by compound on £100 at 7 per cent. will be in five years £5,24 averaging £1,05 per year. In ten years the gain is £26,66 averaging £2,66 per year.

In fifteen years it is £70,81, averaging £4,72. And in twenty years £146,81 averaging £7,34.—A scale of the gain for each of twenty years and the average *per* year is given Appendix, No. 36.

From these statements it is apparent, that when the court charges a party with compound interest as an equivalent for

profits of trade, if the period of charging is five years, it assumes those profits to be on an average £8,05 per cent. per annum on the capital. If for ten years it assumes them to be £9,66 per cent. If for fifteen years £11,71 and if for twenty years £14,93. This shews that the time of the employment becomes of great importance in a question of charging compound interest against an executor. This is done upon the supposition of so much being made by employment in his trade. Now if from the length of time for which compound interest runs, it is unreasonable to presume such large profits have been made, he should not be charged.

I do not think that for the period of ten years the rule of *Schiefflin v. Stewart*, would be improper; with this important provision however that the executor may always be at liberty to shew that less has been actually made. Our rule would then charge him upon the presumption that his trade yielded £9.66 per cent. per annum, upon the capital on hand at the commencement of the time, which would be £2,66 per cent. beyond ordinary interest.

The English rule gives one per cent. more in a similar case, and the difference between us would be in the increase of £1, 66 per cent. This would be the highest rate of profit supposed being upon the sum on hand at the commencement; and upon each subsequent sum received, the rate of profit would be presumed according to the year in which it was received. The scale before referred to shews such rate,

There is another consideration of importance. It will occur in a large class of accounts, that the mode of stating by giving interest upon each sum from the moment it is charged will make the amount against the accounting party greater than by compounding interest at the end of each year—that is, by carrying the interest upon the balance found at the beginning of a year into the balance struck at its close, and computing interest for the next year upon the whole; no interest being computed upon the sums when received.

See Appendix, No. 31 and 34.

Now it is clear that when compound interest is charged, that is the only allowable mode of doing it. The decree in *Raphael v. Boehm* gave interest upon sums from the time of reception, and then half yearly rests for the purpose of compounding. It is in the former as well as the latter particular, that Lord Eldon censures the decree, stating it was peculiar in these points, and was expressed in terms which he hoped would never be found in a decree again.

By this recognized mode of the court, the balance due at the end of a given year, composed of principal and interest, yields

interest through the subsequent year ; but no interest is allowed upon any sum received in the course of such year from its reception to the close of the year. If therefore the whole compound interest does not amount to the whole intermediate interest from the time of reception, till the annual balance is struck, the accounting party gains by compounding, and if the account is for a small number of years, or the balances at the outset small, it may often occur that this will be the case. In the statement of Lord Eldon, and Chancellor Kent, it is assumed that the interest is not received until the close of the year, and therefore they say, as it then began to yield interest, interest shall be charged upon it, that is, it shall be compounded.

An executor will be charged interest, for not putting out balances, unless it is necessary he should retain them for the purposes of the estate.

3 Br. C. R.
433.

" In *Franklin v. Firth*, Lord Thurlow said, that if the money was kept to answer the exigencies of the testator's affairs, it would be an excuse for not paying it over ; but outstanding demands even on probable grounds, were no reason why the executors should not lay their testators' money out."

2 Cox's Cases,
115.

" In *Forbes v. Ross*, he said, that the question whether an executor should be charged with interest on the assets retained in his hands turns on this, whether the fund has been so kept for any other purpose than that of discharging the growing claims upon it. It frequently may be necessary for the executor to keep large sums in hand, especially during the first year, in which case, such necessity is so fully acknowledged, that according to the constant course of the court, the fund is not considered as distributable until after that time."

1 Mad. Rep.
299.

In *Tebbs v. Carpenter*, the Vice Chancellor said,—"That the argument that it was necessary for the executors to keep the balance which they had in 1797, to answer the contingencies of the next year, would have had weight, if in fact it was necessary, and there were pressing demands which required it ;—but the current receipts were greatly more than sufficient to answer the current payments, and no evidence was adduced to shew there was any necessity for keeping that balance in their hands. The same remark applies as to the subsequent balances in the succeeding years."

3 Br. C. R.
433. 11 Vesey,
58.

Retaining money at a Bankers to the executor's credit is considered equivalent to an employment in trade,

Where stock has been sold out, the party is entitled to have it replaced and charge the dividends, or to take the produce of the sale with interest. 5 Vesey, 794. and note.

5th. OF COMPOUND INTEREST. .

The general rule of the court is not to allow compound interest.

"Solicitor General applied for interest upon interest. Lord Waring v. Thurlow—My opinion is in favor of interest upon interest, because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary; and I must overturn all the proceedings of the court, if I give it." Cunliffe, 1 Ves. Jun. 99. 1790. 1 Ch. Rep. 15. Davis v. Higford.

The general rule was here fully recognized—"Except (says the Chancellor) in some special cases, interest upon interest is not allowed, and the uniform course of the decisions is against it, as being a hard and oppressive exaction, and tending to usury." State of Connecticut v. Jackson, 1 Johns. Ch. C. 14.

Where a mortgage contained a covenant, that if the interest was not paid punctually, it should from that time be turned into principal and bear interest. Lord Chancellor Harcourt relieved the mortgagors against the covenant as unjust and oppressive. And the general rule is stated in *Fonblanque's* treatise on Equity. Case of Sir Thomas Meers, cited 1 Atk. 304, and in Cases Temp. Tal. 40. So also 9 Vesey, 271. Vol. 2. 435. Proctor v. Cooper, Prec. Ch. 116. 1700.

"The mortgagee was in possession. The profits did not answer the interest. The arrears of interest were not allowed to carry interest."

This, which is settled law, was decided otherwise in earlier cases, and is stated as an exception to the general rule by *Fonblanque*, Vol. 2. page 435. In 1674, Lord Keeper Finch declared that it should be a rule, that a mortgagee, whose mortgage was forfeited should have interest for his interest. It appears to be the law of the English Chancery, notwithstanding the contradictory decisions of former times, that the assignee of a mortgage is not entitled to interest upon interest paid by him, unless it be assigned with the consent of the mortgagor. 1 Ch. Case, 258. Ashenburt v. James, 3 Atk. 270. 1745. and 3 Rep. Ch. 43. See Fonblanque, 2d, 437, 438.

The decisions upon this point are reviewed in this case.

The doctrine began in *Smith v. Pemberton*. (1 Ch. Cases 67. 17 Ch. 2d) and was in various cases confirmed, and in others denied. "It may be considered, (says Chancellor Kent) as a doubtful question on the ground of these ancient authorities," State of Connecticut v. Jackson, 1 John. C. C. 13.

1804. Lord
Eldon.

In *Chambers v. Goodwin*, 9 Vesey, 264, Lord Chancellor said,—“It was settled, that if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays, he can claim nothing under the assignment, but what is actually due between the mortgagor and mortgagee : and I think that rightly settled.”

See Powel
on mortgages,
383.

This general rule admits of distinction upon particular circumstances. An exception was admitted in the case, *Ashenhurst v. James*, where the assignee of two prior judgments was allowed interest upon principal and interest paid by him, having taken an assignment of all incumbrances by consent of the parties entitled to the estate. The plaintiff mortgagee requested the defendant to take in the judgments.

There are some exceptions to this general rule of the court.

1. When upon a stated account including interest, interest is allowed.

State of Con-
necticut v.
Jackson.

“There are cases in which interest is considered as changed into principal, and permitted to carry interest ; as when a settlement of accounts takes place after interest has become due, or an agreement is then made that the interest then due shall carry interest, and where the principal and interest are computed in a Master’s report, and the same confirmed.”

Brown v.
Barkham,
1 P. Wms.
653.
1720.
Lord Parker.

“The Mortgagee sent in this case an account computing interest to the mortgagor ; who signed the account thus allowing the computation.

I question whether this will make the interest principal, because it does not of itself shew any *agreement* or *intent* to alter the *nature of that part of the debt*, or turn it into principal. I conceive to make interest on a mortgage principal, it is requisite there should be a *writing signed by the parties*.”

Chesterfield
v. Cromwell,
1 Eq. cases,
ab. 287.
1699.

“The heir of the mortgagor was an infant ; his subsistence was derived from the rents.—The interest being in arrear, the mortgagee threatened to enter *unless his interest might be made principal ; upon which* the mother of the heir, with the privity of relations stated an account, and the infant heir signed it. The Lord Chancellor allowed interest upon the account, and the rather in this case he said, because it was for the infant’s benefit, who without *this agreement*, would have been destitute of subsistence.”

Lord Chan.
Somers, 2
Vernon, 365.
Affirmed by
Ld. Keeper
Wright,
1701. Case
cited in
Schnefflin, v.
Stewart, 1
John. C. C.
2 Atk. 331.

It was not the signing the account, but the agreement which was the ground of the charge of interest.

In the decree in *Thornhill v. Evans*, the Master was directed, in stating the account upon the mortgage, “to add the interest to the principal wherever he should find an *agreement*

in writing between the parties, that interest then due should be so converted."

The decree in the case of *Barrow v. Rhineland* directed, In Ch'y. 29.
 "That the defendant be credited with all monies loaned by Sept. 1815.
 him to the bankrupt, with interest from the time the monies were received or paid on account of the bankrupt, down to the taking the account, and that the Master make rests therein at such times, as it shall appear that the parties liquidated their accounts, and agreed that the interest then due should be turned into principal, and that such interest should thereafter be considered as principal."

In *Claucauty v. Latouche*, the bankers had been in the custom of rendering accounts yearly in which principal and interest were stated, a balance struck, and the consolidated sum formed the first item of the next year's account. Lord Mannors said that from the acquiescence of Mr. Conolly he ought to presume an agreement at the end of every year, that the interest then due should become principal and carry interest, which according to *ex-parte Bevan*, this court will admit of. 1 Ball & Beatty, 420.
 9 Vesey, 223.

From the language of the Lords commissioners in *Morgan v. Mather*, (2 Vesey, Jun. 19.) it may be inferred that compound interest would be allowed upon the mere ground of usage of the trade. But they rely upon Lord Thurlow's opinion and decision in *Hankey's* case, which will be found contrary to such a doctrine. He in that case, and in *Ex-parte Champion* also, puts it upon the ground of an implied contract between the parties proven by acquiescence in accounts before furnished, in which interest had been so charged. 3 Bro. C. C. 504.
 3 Bro. C. C. 436. Belt's Ed. note.

2. Interest is allowed upon the amount reported by a Master due on a mortgage. "The mortgagee by getting reports of the money due might make his interest principal, (as it must be after the report confirmed.)" Butler v. Dun, Comb. 1 P. W. 453.
 1718.

There is a similar dictum in *Bacon v. Clerk*. Parker, Chan.

"It is true a Master's report computing interest, makes that interest principal, and to carry interest, for a report is a judgment of the court, and appoints a day for the payment, carrying on interest to that day, and the party's disobedience to the court, in not complying with the time of payment, ought to subject him to interest." Ibid. 480.
 at the Rolls.
Brown v. Barkham, 1 P. Wm. 653. 1720.
 Parker, Chan.

"It is certainly the strict rule of the court, that where mortgagor comes to redeem, and mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest and costs, all that is considered as one accumulated, consolidated sum; and if the time is enlarged, and it goes back to the Master to compute subsequent interest and Bickham v. Cross, 2 Vesey, 471.
 1752. Hardwicke.

costs, the Master reports subsequent interest on the whole sum." And see 1 Vesey, Sen. 696. *Astley v. Powis*.

In *Bickham v. Cross*, the Chancellor said, "there was no instance of the courts computing interest on costs found by a report, except as to a mortgage, but afterwards directed the computation to be made."

Att. Gen. v.
Brewers'
Company. 1
P. Wms.
377. 1717.
Chan.
Cowper.

In England interest is only allowed from the *confirmation* of the report. "On equity reserved, the court ordered interest to the defendants upon the amount reported, from the time of confirming the report, and not before; for that until then, it was no liquidated sum." See also *Kelly v. Ld. Bellow*, 1 Bro. P. Cases, 202, and above 1 P. W. 453.

But our rule is wholly different. All our decrees direct interest to be allowed upon the sum reported due, from the date of the report.

Even if the report be confirmed, and the bill is for a sale, and not to foreclose, and there are other creditors before the court, claimants upon the fund, it seems interest will not be allowed upon interest, in England.

Harris v.
Harris,
3 Atk. 722.
1750.

"The bill was by the mortgagee and other creditors, (by bond) for a sale of the mortgaged premises, against the heir at law of mortgagors. The Master reported a sum due for principal and interest, and the report was confirmed.

There was not near enough arising from the sale to pay the mortgagee and the other creditors.

On motion for interest upon the sum reported due to mortgagee:

Hardwicke.

Lord Chancellor said "The case differs from the common one of a foreclosure, and it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carries 5 per cent. His Lordship proposed that the amount reported should only carry 4 per cent. from the confirmation which was agreed to."

Infant defendants against whom a report including interest is confirmed, it seems do not pay interest.

Bennet v.
Edwards,
2 Vern. 392.
1700.

"Bill that an infant might redeem, or be foreclosed.—Account decreed, and infant to pay the amount reported, unless cause shewn within six months from his coming of age. Report, &c. confirmation.

Powell, 391.

On a subsequent order to compute interest from the report, the Lord Keeper doubted whether interest should be allowed for the interest." And see the doctrine commented upon and supported in *Powell on Mortgages*, page 390. Here again the course of our court has been different. But if an account is taken and report made in a cause in which an infant is

plaintiff, as to redeem, the sum will bear interest from the foot of the account, when confirmed, giving the minor the right only to surcharge and falsify.

It must be observed, that the general rule of giving interest upon a sum reported due, interest as well as principal applies only to mortgages.

In *Bickham v. Cross*, Lord Hardwicke recognizes this as the general rule of the court, especially in cases of an account and performance of a trust decreed. In such a case the further interest is computed only on the original principal, not on the consolidated sum. It is true in that case, he allowed the subsequent computation upon the principal sum that bore 5 per cent. at 5 per cent. and upon the interest ~~subsequent~~ due at 4 per cent. Lord Loughborough in *Creuze v. Hunter*, speaks of this decree, (which at first he thought singular) as sound and consistent with the general principle, upon the peculiar circumstances of the case, the interest having become a substantial debt from *Bickham* the son. In *Creuze v. Hunter* however the rule is explicitly and positively declared. Subsequent interest, except in cases of mortgages, is carried in upon the original principal only, from confirmation of the report.

S. It has been laid down in a case that a surety paying for his principal, is entitled to interest upon interest.

“*Bridgman* Lord Keeper, and *Grimston* Master of the rolls declared it as a rule and course of the court on reference to a Master to state an account upon a mortgage, that all money paid as surety shall be reckoned as principal money from the time of payment, and interest to be allowed according.” But this rule, if at all the law of the court, is confined to mortgages.

“*Rigby* and *Powell* were bound in a joint bond ;—*Rigby* executed a counter bond to *Powell* with interest, conditioned to save him harmless from all charges, damages, &c. on account of the non-payment of the joint bond and interest.

Powell's Executors paid a large sum for principal and interest on the joint bond. In a suit for the administration of *Rigby's* estate, the Master allowed the sums paid for principal with interest upon them, and also those paid for interest, but refused interest on the interest, and upon exceptions Lord *Thurlow* clearly confirmed his decision.”

By the rule of the civil law, interest upon interest is allowed to a surety who has paid the debt.

Badham v. Odell, an infant,
4 Br. P. C. 447.

Creuze v. Hunter,
2 Vesey, Jun. 157.

2 Vesey, Sen. 470: and supplement, 388.

See the rule clearly recognized also in *Turner v. Turner*, 1 Jac. and Walk. 39.

2 Keble, 376.
Mosley v. Elwing,
20 Car. 2.

Rigby v. McNamara,
2 Cox's Cases, 415.

Domat.
Book. 3.
Tit. 4. Sect. 2d.

6th. INTEREST IN RELATION TO THE NATURE OF THE DEBT.

Lloyd v.
Williams,
2 Atk. 108.
Barwell v.
Parker, 2
Vesey, Sen.
364.

Creuze v.
Hunter, 2
Vesey, Jun.
157.

It is a general rule of the English Chancery that simple contract debts do not carry interest.

And their nature is not changed by a report so as to carry interest.

The following case is very instructive on this subject.

"The Lords Commissioners in this case had made an order directing the Master to compute interest on the sums reported due for annuities and legacies, from the confirmation of the report. There having been delay, a petition was presented to reverse this order. Lord Rosslyn said,—That it was hard a creditor should be kept a moment out of the money reported due ; but weighing it upon the point of expediency, he doubted whether the practice contended for in support of the order would be beneficial ; for if it was understood to be of course, that after liquidation of the debt, the accumulated sum would carry interest, those who ought to be most active in prosecuting the decree would then become more negligent than the parties interested in the estate. And though in prosecuting it, any one creditor may when he pleases, obtain an order for that purpose, the consequence would be that they would lie by, and that by the charge of interest, the estate would be ruined. I always understood the constant course of the court was, that debts carrying interest, had interest computed on them by the report down to actual payment ; but simple contract debts, not carrying interest, had no interest computed by the Master, nor after debts were liquidated by the report, by order, from the date of the report. The regular course of the court upon these decrees which occur daily, is this,—The Master is to compute interest upon such debts as carry interest, according to the rate they carry ; and further directions are reserved. He makes a report, and does compute interest according to that direction, and states the amount of the simple contract debts ; the order is then made, that he shall compute subsequent interest from the date of his report. Does any one remember an instance of the Master upon that, computing interest upon such debts as upon his report, do not carry interest ? It is always the course that subsequent interest is computed upon those sums, only, upon which he has computed interest up to the date of his report. He then cites several cases, and concludes thus—Having stated these different proceedings, and there being nothing in them that would warrant the order

made by the Lords Commissioners, or support the idea, that debts not carrying interest in their nature, are from the confirmation of the report, to carry it; I cannot give interest, because I cannot make such an order without breaking in upon the general course of the court. Order discharged."

In *Parker v. Hutchinson*, the Master of the Rolls said, he ^{3 Vesey, 134.} had looked into *Creuze v. Hunter* and perfectly acceded to it.

There are some qualifications of the general rule that simple contract debts do not carry interest.

1. Money advanced.

"The plaintiff a builder agreed to lay out in finishing a house £300, according to a plan of the defendant, who was to pay all expenditures beyond that sum, and to take a lease. He filed his bill for specific performance, and an account and payment of advances beyond the £300. Lord Chancellor said, the Master must inquire what money had been expended above the sum of £300, and interest must be given on it, since it was laid out. It was objected, that the debt was a mere simple contract debt. Lord Chancellor,—Money paid to the workmen who were to be paid by the defendant, is money advanced for him, and it is the constant practice at Guildhall, either by the contract or in damages, to give interest upon every debt detained."

Craven v. Tichell, 1
Vesey, jr. 60.

Such is the rule in our common law courts, cash advanced carries interest. But this rule must in equity clearly be understood in reference to a case between debtor and creditor merely. In the distribution of an insolvent estate, interest is not allowed.

Listard v. Graves, 3
Caines Reg. 234.

"*Clark & Plummer* had jointly and severally covenanted to pay an annuity, and executed mutual covenants to pay a moiety, and indemnify the other against all damages, actions, charges, &c. incurred by the non-payment of the moiety. On a bill for the administration of Clark's estate, the Master reported £1200 due to Plummer for payments made by him on account of Clark's moiety. On the report, a petition was presented for an allowance of interest on the payments."

Bell v. Free,
1 *Swanton*,
90.

Master of the Rolls—The question is, whether under the terms of this covenant of indemnity, the petitioner is entitled to interest on the sums advanced by him in discharge of the moiety of the annuity payable by the intestate; not whether interest might have been given by a jury (in the form of damages) or by the court, but whether it can be allowed by the Master in the distribution of an insolvent's estate. It is clear, by the course of practice, that the Master has no such author-

ity. He is to compute interest on debts which carry interest, but he cannot allow it in the shape of damages. The case of a promissory note is a solitary exception, and as it seems, of recent introduction. He cites some cases as to the rule at law, 1 Campb. 50. 2 Campb. 421. 12 East, 419. He also cites *Rigby v. M'Namara*, 2 Cox. 415. and adds,—Upon these authorities it is extremely clear that the Master was right in refusing interest."

2. On notes or other written instruments, fixing a certain time of payment, or on demand.

Parker v. Hutchinson,
3 Vesey, 134.
1798.
Master of the
Rolls.

"Interest was claimed upon the balance of purchase money, payable by instalments according to a written instrument, and in which default had been made.

The Master of the Rolls said,—It was the practice of Nisi Prius to direct the jury to give interest in cases of promissory notes payable at a day certain, or in such a case of a written undertaking, not to leave it to mere damages. I cannot conceive that this court has ever refused to calculate interest upon debts, that in their nature carry interest. I have looked into *Creuze v. Hunter*, and perfectly accede to it. It is not allowed upon notes payable at a day uncertain, or for mere shop debts, interest was given."

2 Vesey, 157.

Upton v. Lord Ferrers,
5 Vesey, 801.
1801.

"The question in this case was upon a promissory note; the bill was for administering assests. Master of the rolls said, —Nothing is more clear than that, where there is a written instrument promising to pay at a given day, interest is given at law by way of damages, or where it is payable on demand, from the day of demand. It would be ridiculous to have a different rule in this court."

Lowndes v. Collins, 17
Vesey, 27.

"The Master of the Rolls said,—I had always taken it to be clear, that wherever there is a written contract for a sum of money, payable upon demand, or upon a day certain, interest is payable from the time of the demand made, or from the fixed period of payment; and there is no difference, whether that contract is contained in a promissory note, or any other instrument. It would be very inconvenient that a different rule should prevail at law and in equity with regard to that question. Interest was given."

3. Stated accounts.

Lord Hardwicke said, that the balance of a stated account should carry interest; that it will do so between merchants' accounts, of which many instances."

Barwell v. Parker, 2
Vesey, Sen.
364.

It must however be a settlement between the parties. "The accounts between the parties had been settled in India, by a third person, and the question was as to the allowance of interest upon the balance. Boddam v. Riley, 2 Br. C. R. 3 Belt's Edit.

Lord Thurlow,—The cases cited apply only where there are accounts regularly stated between the parties, in which case there is an implied contract on the part of the debtor to pay; and all contracts to pay, undoubtedly, give a right to interest from the time when the principal ought to be paid. But this is not so here. It is true, the sum claimed does, in fact, appear to be due, on balance, at the close of the account; but there was no settlement or acknowledgment by the debtor, which raises a contract to pay, and which is the only ground upon which interest is given. (1 Wms. 653.) For, according to the argument of the exceptant, that whatever appears in fact to be due on the balance of an account shall carry interest, the rule must go to every debt for goods sold and delivered, which certainly is not the law of this country." Tr. Eq. Lib. 1. C. 1. s. 4.

"So in *Liotard v. Graves*, J. Spencer says,—If an account be transmitted by a creditor, and acquiesced in, or assented to by his debtor, it becomes thereby liquidated, and interest is allowable. 3 Caines, 234.

4. As to interest by usage of trade.

In our common law courts it is stated to be the rule. —That by the usage of a particular trade interest may be allowed. If it is customary to allow it after a specific time, and that custom is generally understood, it may be given. 3 Caine's Rep. 234.

But in equity Lord Thurlow has held a contrary doctrine. "One ground taken in this case for the allowance of interest was, that it was always given in such cases by the custom of India. Lord Thurlow said,—Then, as to the custom of the country, even if it does exist to the extent laid down by the affidavits I cannot think I can apply it here. I am to say that, although the general rule of law is otherwise, yet, by reason of this custom, interest is to run on a debt not carrying interest in this country, because the original transaction was in *India*. I cannot admit such a custom to control the clear law of this country." Roddam v. Riley, 2 Br. C. R. 2.

Again,—In *Ex-parte Champion*, he said,—“That where there had been a course of dealing as here, by which interest was always charged and allowed from a certain period, that was evidence of a contract *a priori*, to pay interest, not on the ground of any custom or usage of trade, which he thought could not in such cases alter the law of the land, which allowed no 3 Br. C. R. 439. n. 4. Belt's Ed. Sir J. Simeon's note of the case.

interest on simple contract, but merely as evidence of the agreement in the particular case."

3 Br. C. C.
506.
Belt's Ed.
Sir. J.
Simeon's
note.

"So also in *Ex-parte Hankey*, it is stated, that he confirmed the doctrine held in *Ex-parte Champion*, saying also, that the alleged custom of merchants he did not understand; nor did he decide upon any such thing; but upon the implied contract between the parties in that particular case."

It may be suggested whether the rule that simple contract debts do not bear interest prevails, where the fund for payment is personal assets merely.

Barnard.
Rep. 229.
Mich. 1740.

But it is clearly of a more general application, as appears from its prevailing at law.

It is true, that in a case in *Barnardiston's Reports*, *Loyd v. Williams*, it is said,—“Where a party prays his satisfaction of a simple contract debt merely out of personal assets, a court of equity will of course direct the debt to be paid with interest to be computed from one year after the testator's death.”

1 Br. Ch.
Rep. 41.

But there is not a trace of such a distinction in the subsequent cases. Lord Thurlow in *Shirley and Ferrers*, says, “He could not see how it depended upon the nature of the fund. The whole practice of the court was uniform, that creditors should be paid interest according to the nature of their debts.”

Cited 2 Vesey, Jr. 168.

“So in the case of *the Society for propagating the Gospel v. Jackson*, the fund was plainly personal assets only. In that case several legacies were given, and three annuities for life, and the *residue* of the personal estate was given to the society. An account was decreed. The report stated so much to be due for annuities, and so much for simple contract debts, and the balance. In this case also it was a productive fund. On farther directions, the Chancellor directed the Master to compute subsequent costs, but without interest, the debts being simple contract.”

It is now fully settled in England, that the creation of a trust for payment of all debts, or charging all the debts upon the whole estate will not make simple contract debts to bear interest. See 1 Rep. in Ch. *Earl of Bath v. Earl of Bradford* 2 Vesey, Sen. 588. *Barwell v. Parker*, *Ibid.* 364. *Shirley v. Lord Ferrers*. 1 Br. Ch. Rep. 41.

7th. OF INTEREST BEYOND THE PENALTY OF A BOND.

There perhaps is not a rule more fully settled in the English courts of equity, than that the interest shall not be calculated beyond the penalty of a bond, in administering assets. In fact there is but one case against it, decided by Mr. J. Buller sitting for the Lord Chancellor. His decision was overruled by Lord Thurlow. *Tew v. Earl of Winterton*, 3 Br. Ch. Rep. 489. *Knight v. Maclean*, Ibid. 495. *Bromley v. Goodere*, 1 Atk. 75. *Sharpe v. Earl of Scarborough*, 3 Vesey, Jr. 557. *Mackworth v. Thomas*, 5 Vesey, 329. *Clarke v. Seton*, 6 Vesey, 414. 1 Ball and Beatty, 311. and *Loyd v. Hatchett*, 2 Anstruther, 525. See particularly *Clarke v. Seton*.

The court seem however to admit a distinction where the debtor comes for relief, as to redeem. And in the following case another important distinction is taken, where the bond is accompanied with a mortgage. "This is an important case, as in my opinion it authorizes the master to compute beyond the penalty wherever a mortgage is in suit, though given with a bond." Shower's P. C.
Clarke v. Lord Abingdon, 17 Vesey, Jr. 107.

"Estates had been conveyed to trustees to secure the payment of bonds in which the grantor was surety. One of the bonds was given on the same day as the date of the deed. The Master refused to go beyond the penalties. On exceptions, the Master of the rolls said,—In this case, the creditor has two securities: One by bond, the other by mortgage. If he sues upon the *former*, he cannot have interest beyond the penalty; but the mortgage is to secure payment, *not* of the bond, but of the *sum for which* the bond was given, together with all interest that may grow due thereon. The same sum is therefore differently secured by different instruments, by a *penalty*, and by a *specific lien*. The creditor may resort to either, and if he resort to the mortgage, the penalty is out of the question. The mortgage is not for that. The penalty is not alluded to in the mortgage. Exception allowed."

The supreme court of our state allows interest beyond the penalty. Kent, Chief Justice.—"Upon a review of all the decisions upon this subject, the court think this rule ought to be adopted, that interest is recoverable beyond the penalty of a bond; but the recovery should depend upon principles of law, not be left to a jury." Smedes v. Houghtailing, 3 Caines, C. R. 49.

There is however a great difference where the case is between the parties and the *extra* interest is given in the nature of damages, and when there is a contest of creditors, in the distribution of an insolvent estate.

8th. INTEREST IS NOT ALLOWED ON JUDGMENTS IN ENGLAND.

I presume the course is, for the Master to compute it upon the original debt, if that carried interest, without regard to the judgment.

Viner's Ab.
Tit. Int. c.
15. 2 Vesey,
Jun. 716.

It is said indeed in *Parker v. Harvey*, that judgment debts carry interest. But in *Deschamps v. Vanneck*, Lord Rosslyn said,—“He had a clear opinion upon the question when it was argued, but he had made inquiry and found there was no difference in the practice in the Master's Office, and that all the Masters allow no interest on the judgment. Probably this rule was founded upon that at law, by which no interest was given, though a fresh suit might be brought for it. As a statute of our state has now permitted interest to be computed upon a judgment and levied by execution, the Master may now allow it with us, and it is the uniform practice to do so.

Creuze v.
Hunter,
2 Vesey, Jun.
162. 6 Johns.
Rep. 283.
1 Rev. Laws.
506.

9th. OF THE RATE OF INTEREST AS REGULATED BY PLACE.

Sir John
Champant v.
Lord Ranelagh,
Pre. Ch. 128.
1700.

“The defendant gave his bond to the plaintiff, made in England, and transmitted to Ireland. The money was to be paid in the last country, by returning three fourths of the fees which plaintiff should receive as deputy receiver of the defendant. The Lord Keeper was of opinion it should carry Irish interest.”

Ekins v.
East India
Company,
1717. 1 P.
Wms. 396.

“The plaintiff was owner of a ship. The master and the agent of the company colluded for a sale. The owner brought his bill for an account of ship and cargo. Upon equity reserved, on a question of interest, Lord Chancellor said,—If a man has my money by way of loan, he ought to pay interest; if he detains my money wrongfully he ought *a fortiori* to answer interest: And it is still stronger, where by wrong, one takes my money from me. This being transacted in the Indies, where the agent must be presumed to have made the common advantage that money yields there, the company must answer the interest of that country.”

Decree affirmed by House of Lords. 2 Br. P. C. 72.

"The debt *was contracted* in England, but a bond taken for it in Ireland. Connor v. Earl of Bella-ment, 2 Atk. 382. 1742.

Lord Chancellor,—It is insisted the bond ought to carry English interest, and if it had been a simple contract debt only, I should have been of opinion it ought, and the variation of place would have made no difference. But when the *security is given* upon an estate in Ireland, it must be considered as referable to the place where it is made."

"The general rule is, that contracts are to be adjudged according to the law of the place where such contracts are made, and therefore interest of such place must be paid; not of that where it is sued for." Fonblanque, 2. 442. Ibid.

But a party is considered as contracting in that country in which he undertakes to pay. Huber Pre-lectiones, 2. 1. Tit. 3. See 2 Burr. 1077.

"In *Stapleton v. Conway*, Lord Hardwicke said, that if a contract is made in England for the mortgage of a plantation in the West Indies, no more than legal interest shall be paid upon such mortgage, and if there is a covenant in the mortgage for payment of 8 per cent. it should be within the statute of usury; notwithstanding this is the rule of interest where the land lies. 3 Atk. 727.

10th. OF INTEREST UPON LEGACIES.

If the legacy is charged upon a dry reversion, it shall carry interest only from a year after the death of the testator; that being a convenient time for a sale.

If a legacy is left payable on a certain day, it carries interest from that day, because it is the duty of the executor to tender it. 1 Vernon, 261.

There are cases before Lord Hardwicke upon the point whether interest at 4 or 5 per cent. shall be paid upon legacies; and prior cases in P. Wms.; the court attending to the *productiveness* of the *fund*, or the contrary. Sitwell v. Bernard, 6 Vesey, 539. 1801. Lord Eldon.

But now it is a general rule, that where no interest is given by the will, except where it is given by way of maintenance, it is only to be allowed at 4 per cent. from the end of the year; though it may appear to have produced in the period at a rate of 5 per cent.

"The old authorities say, that if the testator's fund is carrying interest, the legacy shall. But is not that exploded now by every day's practice? Suppose him to have stock only, no other property, yet now no interest is given upon legacies until the end of a year." Gibson v. Bott, 7 Vesey, 97. 1802. Eldon.

Wood v.
Penoyre,
13 Vesey,
333. 1807.
Master of the
Rolls.

"Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid until the money due upon such securities is actually got in; but by a rule adopted for general convenience, this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will."

13 Vesey,
333.
Vesey, 6. 520.

"In *Wood v. Penoyre*, it is said, that in the cases of *Entwistle v. Markland*, and *Sitwell v. Barnard*, it was determined, that the reference by the testator to the time at which his personal estate should be got in, does not without the most plain and distinct indication of his intention, affect the legal presumption that the personal estate may be got in within a year from the testator's death."

Pearson v.
Pearson, 1
Sch. & Lef.
10.
1802.
Lord Redes-
dale.

"The rule respecting the payment of legacies out of the *personal estate*, is taken from the practice in the ecclesiastical courts, where a year is given to the executor to collect the effects, and he cannot be called upon to pay before. But in the case of legacies charged upon land only, where no day of payment is fixed, interest must be chargeable from the death of the testator, or not at all.—Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies. In case the fund is productive within the twelve months, the intermediate profits belong to the residuary legatee."

11th. LIABILITY OF EXECUTORS.

Upon the subject of charging an executor on the ground of his neglecting to call in or secure the monies belonging to the estate, the following are the cases.

1. Neglecting to call in debts out on personal security.

It appears to be the settled rule of the court, that if the executor does not use proper diligence to collect a debt due at the death, and outstanding on personal security merely, he shall be answerable, unless he shew that there was no time when he could have recovered it.

Lawson v.
Copeland,
2 B. C. C.
155.

"Anne Barber made her will in 1765, and appointed the defendant executor, giving him an annuity of £3 for his trouble in receiving rents of her real estate. In 1770, the plaintiffs filed their bill as next of kin, insisting that the annuity had turned the executor *into a trustee for them*, as to the *surplus*. It was decided he was such, and an account directed. The Master reported in 1783, and charged among other things against the defendant, a bond dated in 1761, given to the tes-

tatrix for £100. Upon an exception to this, the Chancellor directed the Master to enquire whether the executor had taken proper steps to recover the money, and whether the debt was good. The Master reported, that the executor had applied by an attorney to the obligor for payment, but had brought no action, nor made any other application : and that it did not appear whether the bond was recoverable or not.

The Lord Chancellor ordered, he should be liable for this £100, as not having been got in, in consequence of his neglect. But refused to charge him with interest upon the monies in his hands."

In *Orr v. Newton*,—Lord Camden seems dissatisfied with this case. There the security was a Mortgage which proved insufficient. Lord Camden said,—“The default imputed is the not calling in securities outstanding at the testator’s death. Only one case has been cited, *Lawson v. Copeland*, and even there it appears that the Lords Commissioners, and the Lord Chancellor differed. However, it is an extraordinary case. What is the Executor to do? Is he to call in the securities before the creditors require payment of their debts? Must the money lie dead without interest, or must he put it out on fresh securities? On the original securities he had the testator’s confidence for his sanction : but on any new securities it will be at his own peril. He should not be required to call in the securities, until creditors call for the payment of their debts, or unless he has reason to suspect the solvency of the debtor.”

2 Coxes cases
276.

The testator gave the residue of his estate to the plaintiff then an infant. Part of it was out upon a bond of Price, as principal, with Roberts, as surety. Testator died in 1792. Interest was regularly paid to August 1795, and in April 1796, Price became a bankrupt. No dividend was received from the bankrupt, and the surety absconded. Price stated he had been failing some time before the bankruptcy, but paid several debts ; and represented that this debt if called for, would have been paid. The Master on taking the account charged the executors with the bond.

Powel v.
Evans, 5 Ves.
sey, 839.

The Master of the Rolls at the hearing said, he must look into *Lawson v. Copeland*.—Certainly there was a great distinction between executors putting out the money themselves, and permitting it to remain upon the security the testator had chosen. Afterwards in his decision he said,—No man who ever sat in this court has been more averse than I am to charge executors who intend fairly to discharge their duty. With a due attention to these circumstances I have considered this case ; and with all the allowance I am desirous of making to

the defendants as executors, I think I should not do justice to the plaintiff or the public, if I did not hold them guilty in this instance of very gross neglect, which must make them liable for the loss. I desire to be understood, that *debts due upon personal security* are what executors, without great reason, ought not to permit to remain longer than is absolutely necessary. I make allowances however for ignorant people. Where infants are concerned they are not to permit money to remain on personal security."

Eagleton v.
Kingston,
8 Vesey, 466.

Lord Eldon,—“The principle of the court is, that where a suit is instituted for the administration of the effects of a testator, the executor, if a debtor to the estate, is bound to deal with himself exactly as he would with any other debtor. Therefore if money is out on personal security, and much more if there is no security, as the court would charge an executor for not calling it in, so they would take it from him, who is both executor and debtor.” The executor must use ordinary diligence to collect debts accruing during his office.

Fibbs v. Carpenter,
1 Mad. Rep.
297.

“The Master had charged the defendants, executors, with several arrears of rents accruing from the testator's estate. On exceptions the Vice Chancellor said,—With respect to the arrears of rent the question is, whether the executors are to be charged with them, or a part of them, and with interest. The management of the houses which were old was left to the executors, and the trust was troublesome and gratuitous. The executors have not produced any evidence in their exculpation. It is possible that there might have been great difficulties in recovering part of the rent, but is therefore the whole amount of the arrears to be lost to the estate? the impression on the Master's mind, as appears by his report, was, that by using proper means, the whole of the arrears might have been recovered. Here for want of evidence, I cannot say that all this rent could not have been recovered: and I am reluctantly obliged to assume that no exculpatory evidence could be produced, and therefore they must be charged with these arrears, interest upon the arrears was but faintly pressed for, and ought not to be given. Interest was asked for in *Lawson v. Copeland*, but refused.

2. The second branch of this subject is where the executors have themselves placed out money on personal security.

It is clearly settled in England, and is admitted by the chancellor of our state, that the executor is responsible in case of insolvency of the party, and must be charged if the debt is lost.

This was held in *Terry v. Terry*, where there was strong proof of the ability of the person to whom the money was lent, at the time of the loan, but he was in trade, and the executor was held liable for its loss. Prec. Ch. 273.

In the case of *Harden v. Parsons*, Lord Northington infringed upon this rule.—“Money out on mortgage was called in, and loaned to one of the executors who gave a bond to the others. *He paid the interest for nine years to the parties entitled.* Lord Northington said,—That if the executor had been guilty of gross negligence it is as bad in its consequence as fraud, and is a breach of trust. *The lending trust money on a note is not a breach of trust, without other circumstances crassæ negligentiae.* That in this case however the confirmation was deliberate, uniform and steady, by all the parties, and they knew of the will and its trusts.” 1 Eden's cases, 145.

The above dictum of Lord Northington is however clearly overruled by subsequent cases.

“In *Adye v. Feulliteau*, the executors had loaned out money in Jamaica at 8 per cent. by which the estate had been increased to the amount of £5000. £1000, had been loaned on personal security and lost. The Master charged them; an exception was overruled. Lord Com. Hotham said,—The court will always discourage lending trust money on private security, though larger interest may be gained. It is a species of gambling.” 1 Coxes, cases. 24.

“In *Holmes v. Dring*, executors were in like manner charged, although the obligors of the bond, principal and surety, were in ample circumstances at the time of the loan. Lord Kenyon,—It was never heard of that a trustee could lend infants' money on private security. This is a rule which should be rung in the ears of every person who acts in the character of trustee. Account decreed with interest at 4 per cent.” 2 Coxes cases, 1.

See also *Wilkes v. Steward*, Cooper's cases, 6, and *Langston v. Ollivant*, *Ibid* 53. where a power given by a testator in his will to place out the money on real or personal security, as should be thought good, was held not to extend to a mere accommodation to a trader upon his bond, although it was in proof he was in good circumstances. The Chancellor of our state had the point before him in *Smith v. Smith*. The question there arose as to crediting the executors in account, with notes upon which the funds had been put out. The Chancellor said, “There is not a single bad note among them. It appears from the testimony that every person to whom they had loaned money was a safe and responsible person, and remained so when the testimony was taken. It would under such circum-” 4 John. C. C. 281.

stances be unreasonable, and render the trust of a guardian an object of hazard and distrust, to charge him with the amount of the notes in cash, and throw the future trouble and risk of collection upon him. I am not aware that any cases carry the rule to this rigorous extent. But in adopting this course, I mean to be understood, that if a guardian or other trustee loan money without due security, he must be responsible in case of insolvency. This is the settled English rule, and it ought to be followed. If *any well grounded distrust* had even been excited by the testimony as to the *safety of the debts*, or any of them, I should have held the guardian responsible. He then observes what was *due security* for monies loaned by a trustee, was a question he was not then called to discuss. He cites many of the above cases, and comments upon them. When the cause was again before the Chancellor upon the equity reserved, he refused to provide in the decree for the indemnity of the plaintiff, in case any of the notes should prove bad."

Page 446.

Cooper's cases, 6.

Whether the distinction taken by the Chancellor is an equitable one or not, I apprehend it is not to be found in the English cases, and that the court in England would not have compelled the plaintiff to take those notes. I do not know how to distinguish the principle of the case of *Wilkes v. Steward*, from this; there the bill was for an account, and to have the legacy left the complainant secured, and for that purpose *paid into court*. The executors answered, that the will gave them power to lay out the legacy in the funds, or *such other good security*, as they could *procure and thought safe*, and stated that they had invested the money upon good security. They submitted to account if necessary. The only question was whether the plaintiff was entitled to the security of the court. Sir William Grant was clearly of opinion, that the defendants had no power to lay out the money upon *personal security*, and that the plaintiffs were fully entitled *to the security of the court*. He sent it to the Master to enquire what was the security."

3 Mad. Rep. 62.

The case of *Vicrass v. Bingfield*, is similar. "Motion for payment into court of a sum of money in the hands of executors, and particularly for a sum of money which they had lent on a promissory note. The Vice Chancellor said, that the point was settled; that the application of the money was improper; and time being asked, stated, that as insolvency was not suggested, nor any danger as to the money, it should be paid by the next term."

The naked principle of these cases is, that the court will interfere and compel an executor to bring the trust money into court, if he has put it out on personal security, although there

is no present danger of loss. Certainly then it would charge him with the money, without crediting the security, when called to account. In truth it is only paying it at another time. It seems difficult to say, that the court, by such a rule is dealing with executors with an unprecedented rigour. If in a case where the borrower is in affluent circumstances at the time of the loan, an established custom of the country, and the express usage of the testator with the very individual, the court will charge him in case of loss, is it dealing more severely when it subjects him, merely to delay or trouble, or to a chance of loss? Besides the court can relieve him by giving him time to collect, as was done in *Vicrass v. Bingfield*.

Upon the supposition that the security is clearly good, the executor is subject to the delay and trouble of collecting it. Should he not be burthened with this, rather than the party entitled to the fund? He has at any rate subjected the fund to risk, by giving it personal security only.

In case of the security being suspicious, the chancellor admits he shall be charged. What will render a debt sufficiently suspicious, must necessarily be somewhat indefinite; but it does seem far the better rule, that any risk however small, should fall upon him who has produced it. In an old case this rule was laid down very broadly.

"It was said in this case, if a guardian for an infant puts out money, it is at his peril, and the infant when he comes of age may elect either to take the securities, or make the guardian account for the money; but he cannot take part of the securities and reject the rest, but must take all or none." Nirk v. Webb, Freeman's Rep. 229.

In our state the facilities of putting out money upon safe real security, in the country are so great, and the expense so trifling, that the argument which may be used that the above rule would prevent monies being put out, and so produce a loss to estates, is of no weight. Nor would the court ever charge an executor with interest on a sum dead in his hands, so small that he could not invest it conveniently on real security, or in public stocks.

12. COMMISSIONS TO EXECUTORS, &c.

In one of the earliest cases before Chancellor Kent, *Green v. Winter*, he disallowed a claim of a trustee for commissions upon sales of lands—on monies received—on contracts which failed—on amount of bills of exchange, and other services connected with the trust. He then stated the doctrine of the English court to be, that no allowances were to be made to 1 John. C. R. 26.

Rep. Temp.
Finch, 261.
2 Chy. C. 83.

a trustee for care and trouble in the management of an estate and adverted to the leading cases. *Robinson v. Pelt*, 3 P. Wms. 249. *Scattergood v. Harrison*, Mosely, 128. 2 Atk. 406 and 643. 1 Vernon, 144. Ibid. 315. 3 Atk. 517. Ambler, 78. 2 Atk. 58. 1 Vesey, 111. 4 Vesey, 72. 10 Vesey, 164.

In *Manning v. Manning*, Chancellor Kent repeated and enforced the position. In *Palmer v. Jones*, 1 Vernon, 144, the Lord Keeper said he thought it a great hardship, that a trustee was allowed nothing for his labour and pains.

In *Miller v. Beverley*, 4 Hen. & Mumf. 419, the Chancellor called the English a monstrous rule, and as far as he could go he would blot it out for ever.

1 Ball & Be-
atty, 106.

In the matter of *Ormsby* a minor, Lord Chancellor Manners recognized the general rule, that in all matters of trust, or in nature of a trust, the trustee is not entitled to remuneration for any extraordinary trouble, and refused to a receiver a charge for superintending a survey, by which the estate was much benefitted.

Marshall v.
Holloway,
2 Swanton's
Rep. 452.

“ Real and personal estate devised to C. M. & V. as trustees upon certain trusts. Bill by M. & V. stating that C. declined acting as trustee, or to prove the will, and being most acquainted with the affairs of the testator, was employed by them as agent; that if C. ought to be discharged from being a trustee, directions might be given therefor, and for his properly releasing, and for ascertaining the compensation to be allowed him for his time and trouble in the conduct of the testator's affairs.

The point was not made in the case, nor is there any discussion respecting it, but the Lord Chancellor's decree is singular according to the established notions of the English rules: It is,—“ And it being alleged by the plaintiffs, the trustees, that the nature of the estate requires the application of great proportion of time, and that they cannot continue the execution without the aid of C. as a Co-trustee, he having had the principal management of the estate in the testator's lifetime, and therefore it would be of benefit that he should continue to be a trustee, and the said C. alleging that a due attention to the affairs of the estate would be prejudicial to his own business, and that he would not have undertaken to act, but under the assurance that application would be made to the court to authorize the allowance of a reasonable compensation for his labour and time, and that he cannot continue to act without such reasonable allowance, it is ordered, that it be referred, &c. to settle a reasonable allowance to be made to said C. for his

time, pains, and trouble in the execution of the said trusts, for the time past; and that the said Master inquire whether it will be for the benefit of the estate, that the said C. should continue to be a trustee under the will, and to receive a compensation for the future employment of his time and trouble; and if of opinion, that it will be for the benefit of the estate that the said C. should be continued a trustee, then the Master to settle a reasonable allowance to be made to the said C. therein.

The Editor cites at the close of this passage the case of *Brocksopp v. Barnes*, 5 Mad. Rep. 90.

This case would appear consistent with the rule before noticed, if the court had treated C. as an agent merely, as never having been a trustee, and had discharged him as trustee in the decree, and given the compensation as agent—but the inquiry is, whether it will be expedient to continue him as trustee, and if so, to settle the allowance. Neither could the case have proceeded on consent of parties, for infants were concerned principally in the questions in the cause.

After the rule was thus declared by Chancellor Kent, the legislature passed the following act, April 15th, 1817.

“That it shall be lawful for the court of Chancery in the settlement of the accounts of guardians, executors, and administrators, on petition or otherwise, to make a reasonable allowance to them for their services, as such guardians, executors and administrators over and above their expences; and that when the rate of such allowance shall have been settled by the chancellor, it shall be conformed to in all cases of the settlement of such accounts.”

In the Matter of Roberts, a lunatic, the Chancellor held ^{3 Johns. C. R. 43.} the committee of a lunatic to be within the equity of the act; and on the 16th Oct. 1817, made a general order, that the allowance settled by the Chancellor as a compensation for guardians, executors, and administrators in the settlement of their accounts for receiving and paying money shall be five per cent. on all sums not exceeding \$1000, for receiving and paying out the same; two and half per cent. on any excess between \$1000, and \$5000, and one per cent. for all above \$5000.

The mode of stating the allowance of commissions is to compute two and a half, one and a quarter, or a half per cent.

OFFICE AND DUTIES

on the aggregate amount received, and the same on the aggregate amount paid. Thus if \$10,000 has been received, it is on

\$1000	\$25
4000	50
5000	25
<hr/>	
\$100	

And the same on the sum paid.

In the case of *Hedges v. Ricker*, July, 1821, it was contended before the Master, that by the true construction of the rule, the per-centage should be charged upon each sum as received, and each sum as paid, according to amount of each specific sum, and not upon the aggregate of receipts and the aggregate of payments. The case shewed very clearly that the compensation as allowed was wholly inadequate, and that the amount upon the method contended for, would not be more than the executor was reasonably entitled to, and the Master was fully of that opinion. The Master however thought himself bound by the rule *ex-parte* Roberts to compute the commissions upon the aggregate of receipts and payments, and the Chancellor overruled an exception taken to his report on this point.

* See *Adkins*
p. 408

In the case of *McWhorter v. Benson*, Nov. 1823, the subject was brought before the Court upon a claim for allowances for care and trouble, other than a mere commission upon receiving and paying money; the ground taken was that the act intended to grant an allowance, not merely for the payment and receipt of money, but for all the services of an executor, &c. and that the Chancellor by his general rule, had only fixed the rate of compensation for that particular service. It was also insisted, that no general rule could be fixed for the compensation for labour and care about an estate, as it must depend on the circumstances of difficulty, and the degree of judgment and labour requisite for each particular case, which would always vary.

Chancellor Sanford appeared to be of a similar opinion, but to think that it was incumbent upon him by the act to make a general rule. It was understood by the Bar, that he intended to settle the questions under this act as far as practicable.

CAP. III.

SECTION 1.

REFERENCES RELATING TO INFANTS.

APPOINTMENT of a guardian of Person and Estate.

In England, a petition is presented to the Master of the Rolls praying a reference to a Master to approve of a guardian. 1 Turner, 384.
1 Harrison, 513.

In general the court will not appoint a guardian, without this reference; but if the estate is very small, and a full and clear affidavit is presented, it will sometimes dispense with it. Ibid. 394.
The court has appointed without it, where the property was only £1000 in value; but refused where it amounted to £1500.

Here an application to the court, and an order is unnecessary. Ex parte Wheeler, 16 Vesey, 266. and case cited.

The forty fourth rule authorizes the party petitioning, to apply to any Master of the court, without an order previous to the presenting of the petition, and obtain his report upon the particulars directed by the Rule to be ascertained; which report is presented with the petition. These particulars are, the age of the infant; his nomination of a guardian, if over fourteen years; the competency of the proposed person; the amount of the infant's property; the annual value of his real estate; the amount of surety to be given; and the names, description and competency of the proposed sureties. Rule 44.

By the English order of reference, "All proper parties are to have notice to attend the Master, and to be at liberty to propose the guardian." He is also directed to inquire what relations the infant has. Our rule admits of an *ex-parte* proceeding, and such is the general practice. Although the Master would be warranted under it, in requiring notice to be given to any persons he might deem proper, yet it is obvious this will not be done, except the case is very peculiar. See the order in 1 Turner, 385.

The parties who ought to be summoned to attend, would be generally the infant's relations or next of kin, viz. those who would be entitled to a distributive share of his estate, if he were dead intestate. Such parties are directed to be noticed in the order for approval of a committee of a lunatic. Circumstances may make it proper to give other persons notice of the proceeding. See Post

It would tend much to the security of the infant's property, and relief of the Master's responsibility, if this provision of the English order was adopted in our rule. An investigation of the character and competency of the proposed guardian and his sureties, will be more thoroughly conducted, when there are conflicting claimants, or relations of the infant, before the Master. According to English practice, the solicitor, upon applying to the Master, should file with him a *state of facts*, setting forth minutely all the particulars directed by the rule to be ascertained. (For the form See Appendix, No. 37.)

1 Turner,
386.

The state of facts in England, also contains the names and consanguinity of the infant's relations. From this the Master can judge, whom to summon before him.

Ibid. 387.

The state of facts must be accompanied by an affidavit, verifying it, which may be made by the proposed guardian.

If any parties are to be noticed, the summons should be underwritten,—“To proceed upon the state of facts and proposal of *E. D.* as guardian of *A. B.* the infant.”

See *Post*,
as to commit-
tees & Re-
ceivers.

In England if a copy is wanted, it is taken from the Master; with us the parties may inspect the original in the Master's office. Affidavits of the proposed guardian and of his sureties, should be laid before the Master, or he may examine them personally: (for their affidavit See Appendix, No. 38.) All enquiries of this character, are carried on in England by means of affidavits. Our court leans to a personal examination; and there can be no doubt that if a guardian or a surety refused to be so examined, the Master would be justified in rejecting him on that ground alone.

He may also examine witnesses, and should examine the infant personally as to his nomination.

By the English practice, if any party would procure the appointment of a different person as guardian, he brings in a counter proposal, verified in the same manner, and proceeded upon in the same mode as the original proposal.

It is usual with us to lay the sworn petition (which is very minute) before the Master instead of a state of facts, and to produce witnesses as to the fitness of the proposed guardian and the sureties to be examined by him. The English course by a *state of facts* and affidavits, and summoning the next of kin, would be more secure, often more convenient, and in cases of no opposition, but little more expensive; being only the cost of the summons and service, and one *ex-parte* attendance of the solicitor. If the petition indeed was drawn as at present, there would be a repetition of the matters set out in the *state of facts*. But to do this in the petition is certainly needless. It

is on the report, that the order is made, and that contains all the particulars. The petition should merely state the fact of infancy, the approval of the persons proposed, and sum fixed by the Master, referring to his report for the particulars. (For form See Appendix, No. 40.)

If the relations, who have a principal interest in preserving the estate, attend and assent to the proposed guardian, nothing more in general need be required; and if they do not attend, it may be presumed they have no objections.

If the application is contested, witnesses may be examined both as to character and property; and where the proceeding is *ex-parte*, if the Master has any doubt or is ignorant of the party's situation he should require proof to these points. Under our practice, as soon as the report is prepared it is delivered to the solicitor, without any summons upon it. By the English course, the usual warrants upon preparing, settling, and signing, are taken out.

1 Turner, 381.

According to the direction of Lord Chancellor Bathurst, the report should specify the reasons of the Master's approval.

"I am directed by my Lord Chancellor to intimate to the Masters of the court, that his Lordship finds it materially necessary in all reports of guardians, and maintenance of infants, that mention should be made in such reports of the age of the infants, and of the nature and amount of the infant's fortune, and of the evidence or grounds on which any particular persons are approved of as guardians." (For form of report, see Appendix, No. 39.)

Mr. Wil-
mot's, (Lord
Chancellor's
secretary)
circular to
the Masters,
Aug. 1777.
1 Turner,
397.

The petition should be left with the Master, as the rule directs him to *annex* it to his report.

The general rule in fixing the amount of security is, by analogy to that upon the appointment of committees of lunatics, to require it in double the amount of the infant's personal property with interest till he come of age, and if there is real estate, to add the amount of the annual income during minority.

Two sureties are necessary.

In England, no sureties appear to be given.

The books speak merely of the guardian entering into a recognizance, and in the bill of costs in Turner's Practice, there is a charge for but one cognizor.

1 Harr. 513.
1 Turner, 388.

The infant however has a security, from that recognizance binding lands from the time of its inrollment.

29 Car. 2d.
Cap. 3 & 18.
2 Vernon,
750. 1 Ibid.
313.

In the selection of a person as guardian, the following rules should be regarded.

It seems that, if the father of the infant is living, the Master has no right to approve of any other person as *Guardian*.

The court has frequently called the father and mother guardians by nature. Thus in *Ex-parte Hopkins*, Lord Chancellor said,—“The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture but by nature.”

Hargrave's
note to Coke,
Litt. 105. n.
12.

The court does not use this phrase in the technical sense of the common law, by which a guardian by nature could only be of the heir apparent, but according to a natural propriety.

2 Br. C. C.
500.

In *Powell v. Cleaver*, the right of the father to the guardianship was not questioned by counsel, where another had been appointed by the testator; but it was urged, that the father had renounced by his long acquiescence, and that the court would not allow him to insist upon it, to the forfeiture of a legacy to his children.

15 Vesey,
445.

“In *ex-parte Mountfort*, the petition of the infant and proposed guardian stated he was heir at law to his grandmother; that his father was in possession of the estate, was insolvent, and misapplied the rents and profits, and prayed the appointment of the person proposed, to be his guardian. Lord Eldon said,—I have no doubt, that in certain cases, the court will, upon petition, without a bill, appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian. An order was made.”

1 P. Wms.
705.
See also
DeMandeville v.
DeMandeville, 10 Vesey,
63.

And in the Duke of Beaufort v. Bertie, Lord Chancellor said,—“The court would and had interposed, even in the case of a father, as where the child had an estate, and the father, who was insolvent, and of an ill character, would take the profits, there the court has appointed a *Receiver*, which was done in the case of *Kiffin v. Kiffin*.”

Now as the rule directs the approval of a person, and examination into his competency, as *Guardian*, and the father has an exclusive right to that character, the Master cannot report another as proper for that situation.

I conceive, however, that the Master may refuse to approve of the father, if he is unfit; and upon an application to the court for an order to do so, the court would not grant it, without directing the Master to state his reasons.

The same rule, I presume, prevails, as to a mother. Lord Hardwicke in *Roach v. Garvan*, says,—“I appointed the mother guardian, who is properly so by nature and nurture, where there is no testamentary guardian.”

1 Vesey, Sen.
159.

The maxim of the common law, that the guardianship shall not be given to the next of kin, upon whom the lands may descend, is overruled in equity.

See Dormer's case, 2 P. Wms. 264.
7 Vesey, 571.

BOND OF GUARDIAN.

IF the report is confirmed, the order directs, that the party be appointed the guardian of the infant, upon his executing a bond, together with the sureties, named in the Report in the sum fixed thereby, to be approved of by a Master, and filed with the Register or assistant Register.

See Post Tit.
Bond of Committee of Lunatic.

The bond is prepared by the solicitor, and the Master indorses his approval upon it. It need not be executed before him.

For the form of the bond and approval, See Appendix, No. 41.

CAP. III.

SECTION 2.

MAINTENANCE OF INFANTS.

IT is the course of the English court to appropriate a certain sum out of the fortune of the infant for his support, and to direct a reference to fix the amount. This is not usual here; the disbursements are judged on the settlement of the guardians' accounts.

The English course is in some particulars preferable, least troublesome to the guardian, and least expensive in the result, as the guardian in passing his accounts would be allowed the whole sum fixed for maintenance, without proving his disbursements particularly. But it has this disadvantage, that the guardian having a fixed sum, may be tempted to profit by it, by diminishing the proper allowances to the infant. It is however competent for the infant's relations to question or re-

3 ALK. 618.

duce the allowance upon the neglect of the guardian to apply it for the infant's use.

It has been doubted whether maintenance could be given on the appointment of a guardian *ex-parte*, without a suit in court.

Ex-parte
Whitfield,
2 Atk. 315.

Lord Hardwicke said,—“ When this petition was formerly heard, I had a doubt whether the court could, upon *ex-parte* applications, allow a maintenance for an infant, where no cause is depending, for it is at the peril of a guardian in socage, what he applies for maintenance, and he will be allowed according to the discretion he has used, and therefore I directed it to stand over for precedents.”

He then cites several cases, particularly, *Tenham v. Barrett*, 2 Br. P. C. 539. and concludes thus,—“ There may be great convenience in applications of this kind, because it may be a sort of check upon infants with regard to their behaviour, and it may be an inducement with persons of worth to accept of the guardianship, when they have the sanction of this court, for any thing they do on account of maintenance, which otherwise would be at their own peril ; and likewise of use in saving the expense of a suit to the infant's estate.”

3 Br. C. C.
88 and 500.

And in *ex-parte Kent*, and *ex-parte Salter*, maintenance was directed upon a petition, after argument ; the register Mr. Dickens, doubting the propriety of it, without a suit, to bring the fund into court.

4 John. C. R.
102.

In *ex-parte Bostwick*, Chancellor Kent approved of the present English practice.

1 Turner,
389 and 200.

If the petition prays maintenance as well as a guardian, which is usually the case in England, the order includes a direction to the Master, “ to consider what is proper to be allowed for the maintenance and education of the infant.” If the guardian proposed, has expended any thing before, the words, “ for the time past, and to come,” should be added.

In such a case, the state of facts, laid before the Master, should contain, in addition to what is requisite upon the appointment of a guardian merely, a statement of the items of previous disbursements, (which may be by way of schedule) and a proposal of their amount to be allowed for previous disbursements, as well as an annual sum for future maintenance. The statement of expenditures must be proved by vouchers as usual. The application for maintenance may also be distinct from that for a guardian ; or, after an allowance an increase may be applied for. In such case, the practice as before detailed, where the maintenance is combined with the order for appointing the guardian, will afford a guide. The

Ex-parte
Kent, 3 Br.
C. C. 88.
Burnet v.
Burnet, 1 Br.
C. C. 179.

state of facts should contain every thing, except what is peculiar to the proposal for the guardianship. It should be sworn to and the voucher produced of past expenses if any.

SUIT PENDING.

IN the course of a suit, for the administration of assets, where infants are entitled as legatees, or to a distributive share, the court will in a proper case, order a sum to be allowed for maintenance.

If a provision to this effect is not contained in the decree, an order may be obtained, upon motion with notice, that the Master may be at liberty to make a *separate report* of the personal estate, and of the debts, legacies, &c. and also what is proper to be allowed for the maintenance and education of the infants.

1 Turner
198 and see
the notice,
2d. Turner,
198.

In *Rogers v. Wilkes*, 6 Johns. Rep. 586: such an order for an allowance for maintenance was made after filing the bill.

A direction to this effect is sometimes contained in the decree, as in *Stroud v. Stroud*, where it was to allow "for the time past from the death of the father, and for the time to come, and to make a separate report of guardian and maintenance." The bill was there by an infant legatee for security of her legacy.

2 Turner,
417.

Though the court usually directs a report of debts, and the personal estate in order to decide whether maintenance should be given, yet if satisfied *aliunde* of the sufficiency of the funds, it will order it, without. "Motion on behalf of the daughter of the testator and residuary legatee, for an allowance pending the accounts."

Warter v.
13 Vesey, 93.

Lord Chancellor,—“The general rule is admitted that the court ought not to take any sum from a trustee, for the residuary legatee, until the fund appears clearly free from incumbrances. But I willingly accede to the practice which began in *Wear v. Wilkinson*, and is very just on account of the delay in taking the accounts, that where the court can see clearly there will be a clear fund, the residuary legatees shall have an allowance for maintenance in the mean time.”

“Petition to confirm a report of maintenance. No report had been made as to debts, but it was stated by affidavit, that the funds were sufficient to pay them. Opposed on the

Jervoise v.
Lilk, Cooper's
Rep. 52.

ground, that the application was premature, the report of debts not being made.

1 Turner,
199 and 200.

Sir S. Romilly replied, that the objection had been got over by Lord Eldon in *Warter v. —*, upon the authority of a case of *Wear v. Wilkinson*, and upon the principle of the length of time the taking of the accounts might consume. It was enough if the court was satisfied aliunde, that the property was sufficient. The report was confirmed." The practice in this case is similar to that upon a petition. A state of facts and proposal must be brought in, and every thing which is not supported by the proofs of the cause already before the Master, should be verified by affidavit, or other testimony. The warrants taken out are underwritten as directed under the former head, and must be served upon the opposite solicitor in the cause. The Master adjourns until the matter is decided upon.

When his report is prepared, a warrant should be taken out, underwritten,—“The Master has prepared a draft of his separate report;” and the usual warrant to settle it. The forms of the state of facts and report given in the Appendix upon the proceeding by petition for a guardian, will be sufficient guides for the framing them in a suit.

From the principle of the cases before cited of *Warters v. —*, and *Jervoise v. Lilk*, it is obvious, that the Master must proceed far enough in taking the account, to see that the fund is clear, before he can allow the claim of maintenance to be brought before him. It appears to me that it would be sufficient and proper for him to report, that from his examination of the accounts, it appears that the allowance for maintenance will not render the fund inadequate.

APPLICATION WHEN FATHER IS LIVING.

IF the father of an infant is living, and is desirous of an appropriation out of his fortune for maintenance, it is made part of the decree or order, that the Master shall inquire and state, “Whether the father of the infants is in circumstances, and of ability to maintain and educate his infant children suitably to their fortunes, and if *not*, then to consider of a proper allowance, &c. for the *time past and to come*.”

1 Turner,
199 and 200.

Sometimes the court will decide upon the father's ability itself, and omit this matter in the order of reference, where the circumstances are strong; as where the fortune of the child is very large, and the father has other children, or will be much inconvenienced by the burthen of supporting the child adequately to his fortunes, in which the father cannot participate.

See ex-parte, Penlege, 1 Br. C. C. 387. n. (1) Belt's Ed. 1820. and 3 Vesey, 733. Horte v. Pratt.

The state of facts in this case must include a statement of the father's circumstances, family, &c. and the report certify his inability. In other respects the proceedings are the same as before detailed.

Where a father applies for maintenance, he must appear incapable of properly supporting his child.

"When the question turns upon the ability of the father to maintain the child, the rule is not laid down upon the father's absolute insolvency only; but maintenance is given when the father is not in such circumstances as to be able to give the child such an education as is suitable to the fortune which he expects."

Per Lord Thurlow in Buckworth v. Buckworth, 1 Cox's cases, 80.

"The father was intitled to an estate of £6000 per year, and his six children to one of £8600. The father having applied for maintenance, the Master allowed £1400 a year out of the infants' fortune. The father stated his establishment to be equal to his income. On petition to confirm the report, Sir William Grant said,—It is very loose to consider any particular income as enabling a father to maintain his children. On the outside it would here seem enough; at the same time the expences of his establishment, and his children's expectations are circumstances to be looked to. It would be a harsh thing in the court to oblige the petitioner to put down his establishment in any part, to educate his children, when they have large incomes of their own. I do not see enough to make me dissent from the conclusion of the Master, who, of course had his attention directed to all the facts and particulars more than the court can possibly have."

Jervoise v. Lilk, Cooper's Rep 52.

If property is given to an infant, and maintenance directed out of it, it is construed to mean, *if there is no maintenance due to the infant in law*, and if the father is of ability to give it suitably, the court will not apply the property.

"A direction to trustees to apply the produce of a fund in the maintenance of infants is always construed in this court to mean, that such application shall be made, if there is no maintenance due to them in law, but not otherwise. Now while the father is living, maintenance is in the law due from him."

Per Lord Thurlow, in Andrews v. Parlington, 2 Cox's Cases, 223.

Hughes v.
Hughes, 1
Br. C.C.
Rep. 387.

The Lord Chancellor said,—“ The practice was to refer it to the Master to enquire whether the parents were of ability to maintain the children ; if not, then to report what would be a proper maintenance ; and this practice did not vary where a maintenance was directly given by the will.”

It was Lord Thurlow's rule, not to allow a father any thing for his past expenditures, however unable to support the children ; but only from the date of the report.

In *Andrews v. Parlington*, he said,—“ It was the constant and very proper rule of the court, that it never will make the father any allowance with retrospect to what he has paid without the authority of the court.”

9 Vesey, 283. But in *Sisson v. Shaw*, the Master of the rolls said,—“ *Andrews v. Parlington*, had been much shaken ; he had found two decrees by Lord Alvanley, allowing maintenance for the time past.”

14 Vesey,
499,

And Lord Eldon observes in *Makerly v. Turton*,—“ In the case of *Andrews v. Parlington*, Lord Thurlow thought it so extremely dangerous, that a parent should determine for himself the question whether he was of ability to maintain his children, that he would not allow Mr. Parlington one shilling of the money which he had permitted to be expended in the time past. The decision was according to precedents ; but there is no doubt that since that time, the rule has been altered. At present, as the precedents stand, the court must look at each case, with a view to make such order as the rule prescribed by the testator and the conduct of the parties allows.”

And see
Wilkes v.
Rogers,
6 Johns.
Rep. 594.

Mr. Verney, Master of the Rolls, states, that the mother like the father can only have maintenance out of the infant's property, where she is unable to support him.

Fawcner v.
Watts, 1 Atk.
408.

“ I shall not dispute but every father and mother by the law of nature, is under an obligation to maintain their own children, but yet this may be varied by circumstances ; for suppose the father or mother should be in a low or mean condition in the world, the court will order, especially in the case of a mother, that the child should be maintained out of a provision left to it by a collateral relation.”

Wilkes v.
Rogers,
6 John. Rep.
585: 593.
Domat's civil
Law, l. 670.

And in our court, the obligation appears to be considered binding upon the mother, although perhaps not to as great an extent as upon the father.

Our rules upon this subject differ from those of the civil law, by which the father was allowed the *usufruct* of all property obtained by the child, with certain exceptions, such as the donations of the prince, and acquisitions coming under the head of child's *peculium*. The father was also entitled, if in neccessitous, cir-

umstances, to a support out of the property of the child. In one point, the court has advanced towards this principle. The Master may take into consideration the circumstances of the rest of the family, in making his allowance of maintenance, ^{1 Vesey, 160. 7 Jun. 403.}

CAP. III.

SECTION 3.

REFERENCE AS TO AN INFANT TRUSTEE OR MORTGAGEE.

IT is provided by statute, "that it shall be lawful for any infant seized or possessed of any lands, tenements, or hereditaments by way of Mortgage, or in trust only for others, to convey the same by direction of the court of chancery, signified by an order made on hearing all parties concerned, and on the petition of such infant or his guardian, or of any person in any way interested therein." ^{Sess. 24. Cap. 30. 1 R. L. 148.}

This act is taken from the 7th Ann. Cap. 19.

"A petition must be presented. A motion is irregular." ^{8 Vesey, 86.}

The court sends it to a Master to enquire whether the infant is a trustee or mortgagee.

"In this case it is only necessary to ascertain whether the infants be really trustees within the act, according to the allegation of the petition; and the usual course is to order a Master to enquire and report. I shall accordingly direct, that the petition be referred to one of the Masters of the court to examine into the matters of fact contained therein, and to report the same with his opinion thereon, and that he give notice to the guardian or next friend of the infant of the time and place of such inquiry." ^{Ex-parte Quackenboss, 3 John, C. C. 408.}

For the form of the petition, See 1 Turner, 405, where the mortgagor came to redeem, and the heir was an infant.

The order runs,—“That it be referred to Mr. — one of the Masters of this court; to examine and certify how the estate (in the premises set forth in the petition) is vested in the said A. B. and whether he is an infant, and a mortgagee, (or trustee) of the said premises, or any and what part thereof, within the intent and meaning of the act of, &c. entitled, “an ^{2 Fow. Exc. Pr. 431.}

act, &c." and after the said Master shall have made his report, such order shall be made as shall be just."

In England a state of facts is laid before the Master, setting forth shortly the instruments by which the infant has become a mortgagee or trustee, the death of the ancestor, and age of the infant. In case of a mortgage, it should also state the default in the payment.

1 Turner,
106. 2 Fow.
Ex. Pr. 432.

This state of facts must be supported by the deeds or other instruments and by an affidavit of the death of the trustee or mortgagee, and the age of the infant, or oral testimony thereto, and to such other facts as the Master may require. It would be correct practice with us, to lay the deeds before the Master which shew the trust, with affidavits to the necessary facts, or to produce witnesses to prove them.

1 Turner,
399. Fee
Bill.

In *ex-parte Quackenboss*, notice is directed to be given; a warrant therefore must be taken out which may be underwritten,—“To proceed upon the state of facts left by the petitioner.” The nature of the proceeding, and parties to the petition will shew the Master upon whom it should be served. If no *state of facts* is filed, the underwriting may be,—“To proceed upon the inquiry, whether A. B. is an infant trustee.”

1 Turner,
400.
Fee Bill.
See Post, Tit.

When the report is prepared, the usual warrants are taken out on preparing it, &c.

The report comprises the matters of the state of facts as proved, and the Master's opinion whether the infant is a trustee or not.—See Appendix, No. 42.

WHO ARE INFANT TRUSTEES OR MORTGAGEES WITHIN THIS ACT.

IF the infant has a duty to perform beyond the mere conveyance, he is not within the act.

Attorney General v. Pomfret, 2 Cox's Cases, 221.
See also *Ex-parte Jutin*, 3 Ves. & B. 149.

“Money was given by a will to be laid out in lands to be settled for teaching poor children, and putting them out as apprentices.—The executors laid out the money, and took conveyances of the land to trustees for the purposes of the will. The Master found the legal estate vested in an adult, and the infant, but concurred he was not within the act, inasmuch as he apprehended that act related only to cases of mere or pure trustees, and not where the trustee had a duty or office to per-

form. The bill was for the appointment of new trustees, and a petition was presented that the infant might convey.

The Master of the Rolls thought him within the act: he would be out of it, although he had no beneficial interest, if he had any duty to perform. The Master's principle was right, but he had misapplied it; because by the conveyance to new trustees, to be appointed by the court, the duty would cease, and be performed by other persons; but if there was no such appointment, then the infant would not be within the act."

The cases are contradictory whether the infant heir of a vendor who has died after a contract for sale, but before conveyance, is within the act. "A. having made a contract with B. for the sale of real estate, and earnest being paid, both vendor and purchaser die before completion. A bill is filed by the executors of the vendor against the executors and devisees of the purchaser, for the payment of the residue of the purchase money, and also against the infant heir of the vendor, to compel him to convey.

Smith v. Hubbard, Dickens, 730. and see Sugden on vendors, 153.

The Lord Chancellor held the infant to be a trustee within the statute, and directed him to convey."

In *Goodwyn and Lyster*, however, a contrary doctrine was held. "G. and P. articulated for the purchase of an estate. G. to convey to G. by the 21st March ensuing. G. to pay the purchase money. P. died before the day, leaving an infant heir. The bill was brought for a conveyance on payment of the purchase money.

3 P. Wms. 387.

Lord Chancellor Talbot said,—“The question was whether this, being a trust only by construction of equity, was within the act, and that he inclined strongly to the negative. That there was no doubt it was a trust, whenever one man articles for the sale of an estate and agrees to convey for a certain consideration; from the time the articles ought to be performed, the one becomes entitled to the estate, and the other a creditor for the purchase money. But he did not think constructive trusts to have been within the view of the act; and decreed that a day should be given to the infant to shew cause why he should not convey, as in other cases.”

“So again where there was an infant devisee of real estate charged with debts, and the personal estate was deficient, the court would not treat the infant as a trustee within the act, but gave him a day as usual.”

Anon. 3 P. Wms. 389. n. (a)

The case *ex-parte Vernon* is also an authority against constructive trusts being within the act.

2 P. Wms. 519.

“The father had frequently declared he was a trustee for A. who had paid the purchase money. Lord King allowed

the infant to convey as a trustee on account of the smallness of the property, but declared that in future, he would leave the *cestuique trust* to bring his bill, and have a decree against the infant to convey, because these orders for an infant trustee to convey ought to be in the plainest cases, and not in such which are subject to the disputes, which trusts without writing are liable to." If the infant is beneficially interested, or there is a doubt upon that point, the court will not in general order him to convey under the act, but will leave the party to a suit against him.

Hawkins v.
Obeon, -
2 Vesey,
559.

See Belt's
supplement
page 414.

"The defendant was trustee of lands devised upon certain trusts, after being charged with debts. On a bill for sale to pay the debts, there was a decree, and the defendant died before conveyance. The question was whether the defendant's infant son was a trustee within the act. The Master had certified in the affirmative. Lord Hardwicke said,—He had no doubt he was within the act; here was no pretence, the infant had any kind of interest beneficially for himself. Where the infant has an interest, the court will not determine it by any such interlocutory method, but it must be by proper suit. If there had been any doubt as to interest, it would not now be material, as there had been a decree which binding the ancestor, binds the infant."

An infant is a mortgagee within the act, although interested in the money as residuary legatee.

Ex-parte
Carter,
Dickens,
609.

"The Master in this case reported, that the infant was not a mortgagee within the act, because he was interested in the mortgage money, as it might be part of the residuary personal estate of his intestate father, the mortgagee.

But the Lord Chancellor upon petition ordered, that the infant should convey, saying that the mortgage money was *prima facie* part of the assets to be administered, and it was absurd to call it a residue until an account of the debts and estate was taken by a suit. That he could not notice any beneficial interest the infant might have, and was clear he was an infant mortgagee."

Ex-parte
Marshall
17 Vesey,
383. n.

"Upon a reference to inquire and state whether an infant was within the statute, the Master reported, that the infant was the heir at law of the mortgagee, and was also one of his four residuary legatees, and therefore as the infant had an interest in the mortgage money, he was not a mere trustee within the act. But the Master of the rolls was of a contrary opinion, and made an order that the infant should convey the estate." If the infant is a co-executor, he is still within the act.

"Upon a reference of title, an objection was taken that the infant heir of the mortgagee could not be ordered to convey as a trustee under the statute, having an interest in the money as one of the residuary legatees with another person, who was co-executor with the infant.

2.
Handcook,
17 Vesey,
383.

Lord Chancellor,—The principle is that an infant trustee within the statute must be a dry trustee, having no interest in the subject. I have looked into *Zouch v. Parsons*, which is precisely the same, and the court held, as the co-executor had a right to receive the money, and could give a discharge, and that payment would be good against the infant, he is a dry trustee.

He afterwards said, that upon consideration his opinion was that payment to the co-executor makes an infant a trustee within the statute."

OF SETTLING THE CONVEYANCE.

WHEN the report is made, a petition must be presented, or motion made to confirm it, and that the infant may be directed, by order of the court to convey the premises; and that if the parties cannot agree upon a conveyance, the Master should settle the form.

1 Turner,
407. 2 Fowler's Exch.
Prac. 432.
See the order,
2 Fowler,
433. Eq.
Draft. 604.

The draft of a conveyance should be left with the Master, and a summons taken out and served. When the Master has determined upon the conveyance, he writes his allowance upon the engrossment.

1 Turn. 227.

It is the practice in England to make a report of the allowance of a conveyance in all cases, where the Master is directed to settle it. This practice has not prevailed here, but it would be proper, if either party was dissatisfied with the Master's judgment upon the conveyance. Such party may call upon him for his report, with the conveyance annexed, and present a petition with notice, that he may be directed to review his report, and amend the conveyance in the exceptional particulars.

There are some points of importance respecting the mode of conveying.

In this case it is stated,—“That upon a petition under the statute of Ann, reading the declaration of trust, &c. an or-

Anon. Prec.
in Chan. 284.

der was made for the infant by *her guardian*, to convey over the trust estate to the *cestui que trust*, and the conveyance to be settled by the Master."

It does not appear to me however, that the conveyance by a guardian is necessarily the form.

7 Ann. Cap.
19.

The act provides, that it shall be lawful *for any person under the age of 21 years*, (having an estate in trust or by way of mortgage, as mentioned in the preamble) by the direction of the court, &c. to convey and assure such lands, *in such manner as the court shall direct*; and such conveyance or assurance shall be as effectual as if the infant was of the age of 21. And by the second section, "Every such infant shall and may be compelled, by such order, to *make such conveyance in like manner*, as trustees or mortgagees of full age are compellable to convey or assign."

1 Turner,
407.
and Eq.
Draft. 604.
2 Fowler,
433.
16 Vesey,
554.

So the form of the order is, that "the infant may be directed to convey the premises."

In *Ex-parte Cant*, a motion was made that the mother of an infant should be committed for not permitting him to convey. She, it appears, opposed it, on account of a refusal to pay the infant's costs." If it was the course for the guardian to convey, the motion would have been against him. The terms, "in such manner as the court shall direct," used in the act, seem to refer to the nature of the conveyance or assurance, as by lease, release, fine, &c.

Mr. Jay.

In the matter of *Thomas I. Delancey*, the point was expressly submitted to the Chancellor, and authorities referred to. He ordered the infant to convey by guardian.

23 Ass. 1821.

In the matter of *Eliza Ann Ellison and others*, under a petition for the specific performance of articles of agreement, under the act, 37 Sess. Cap. 108. by infant heirs, the order was made by the Chancellor, "that the said infants notwithstanding their infancy, may by their guardian, but in their names, execute under the direction of one of the Masters of the court, a good and sufficient deed of conveyance to, &c."

In Equity,
First Circuit,
23 June,
1823.

And in *The Matter of the petition of Abraham Bidney and others*, under the same act, 37 Sess. Cap. 108, the course was taken upon consideration, of executing the conveyance, by guardian. The infant was very young. The conveyance was approved of by the court, the point being considered. The result appears to be, that under the statute 7 Anne, the infant himself *may* execute the conveyance, and the act contemplates his execution, by the most natural construction of its terms. That the court however holds that an execution by guardian is an effectual execution by himself, and this meets the absolute necessity of some cases.

The necessity of the case sometimes requires that the conveyance should be by guardian, as where the infant is too young to acknowledge the execution.

In the case of *Gratz v. Beere*, which was conducted with great attention by eminent counsel, the infant being held an infant trustee, the order was, "that the infant defendant in this cause by *himself or his guardian ad litem* in this cause, do convey and release unto the said complainants, &c." and the deed was drawn making the infant party of the first part, and his guardian *ad litem* of the second part; and both executed it, There the infant was over 14 years of age. 1 Oct. 1817.

Where a specific performance is decreed of an agreement made by a lunatic, the conveyance is executed by the committee, by the express provision of the statute. S. Laws,
Cap. 30. 29.
Sess. Sec. 5.

An infant *Feme Covert* conveys her trust estate by fine in England. Ex-parte
Maine,
3 Atk. 478.

I presume there is no objection to her conveying in this state by an ordinary conveyance, properly acknowledged under the statute. See *Jackson v. Holloway*, 7 John. Rep. 86, and *Jackson v. Gilchrist*, 15 John. Rep. 89, in which case the origin of these conveyances by a *Feme Covert*, without fine, is elaborately traced.

CAP. IV.

CONCERNING LUNATICS.

SECTION 1.

APPROVAL OF COMMITTEE OF A LUNATIC.

UPON the return of the inquisition, finding the party a lunatic, the court usually directs a reference to a Master to approve of a committee of his person and estate.

If the property is very small, the court will sometimes appoint, without a reference, but in such case, circumstances as to character, &c. should be shewn by affidavit, to warrant the appointment of the person proposed. Ex-parte
Pickard,
3 Vesey & B.
127.
1 Collinson
on Lunacy,
196.

If the reference is resorted to, upon filing the inquisition a petition is presented, praying the appointment of committees.

See the form in *Blake's Chan.* 446.

2 Collinson,
229.
1 Turner,
696.

The form of the English order is,—“ That it be referred to a Master to inquire and certify, who is and are the most fit, and proper person or persons to be appointed committee or committees of the person and estate of the said lunatic. That the said Master do also enquire and certify who is or are the heir at law and next of kin, of the said lunatic, to whom let due notice of attending the said Master be given.”

The usual order by our practice is,—That it be referred to one of the Masters of the court to enquire and report whether A. B. (the petitioner) is a fit and proper person to be appointed the committee of the person and estate of C. D. the lunatic, and also who are fit and competent persons to be the sureties of such committee, and the amount of security to be given by such committee together with his sureties.

Our proceeding is generally ex-parte, but the Master may require the next of kin, or other parties to be summoned to attend, if he think it advisable.

1 Collinson,
196.

The party applying should lay before the Master a state of facts and proposal, the form of which is given in the Appendix, No. 43. It should be verified by affidavit, which may be made by the proposed committee.

1 Turner,
651.

It exhibits the amount and particulars of the lunatic's fortune, the relationship of the proposed committee, and the names of the next of kin, and heirs at law of the lunatic, the names of the proposed sureties, and the proposed amount of security. The particulars of the fortune may be proven by the inquisition, or by a certified or sworn copy. Otherwise they must be verified by affidavits or the examination of witnesses.

The Master then issues a warrant. This is served upon the next of kin, and warrants to proceed upon the proposal are taken out till the enquiry is disposed of.

1 Collinson,
196.

If the party attending is not satisfied with the proposed committee, he may lay a *counter proposal* before the Master.

See Appen-
dix to Collin-
son, 2 Vol.
157 and 414.

In England the course is to produce affidavits as to the qualifications of the persons proposed, or other material facts. The inquiry may be conducted here in the same manner, or by the oral examination of witnesses.

Affidavits made by the sureties of their sufficiency, should also be laid before the Master, or they may be personally examined by him, according to convenience.

The affidavits or examination should be procured when the Master has decided as to the amount of security, (as to which see post.) Each surety, by the general practice swears to his being worth the amount of the required security, after all just debts and incumbrances discharged. Appendix, No. 44.

In England the approval of the security and the sureties is made by the Attorney General after the appointment. 1 Turner, 697—8.

The next of kin are those who would be entitled to a distributive share of the lunatic's estate if he was dead intestate.

They are entitled to their costs on attending the Master upon the approval of a committee, to be paid by the committee, and allowed on passing his accounts. 1 Collinson, 461.

In England when the Master has prepared his report, he issues the usual warrants upon it. Of course under our *ex-parte* proceeding this is not done. For the form of the report; See Appendix, No. 45. 1 Turner, 636.

In the foregoing statement of practice, I have treated the same party as applying to be committee both of the person and estate. It will be easy from that statement, and the precedents in the *appendix*, to adapt the proceeding to the case of different persons applying to be committee of the estate, and of the person.

The principal rules of the court relative to the persons who should be appointed to this office, are these :

First,—As to the committee of the person.

The Chancellor may appoint any person he thinks fit, to be the committee of the person. The Master of course has the same discretion in approving of a proper person. 1 Collinson, 204.

The old rule excluded the heir at law from the custody of the person ; but it is now overturned. Dormer's case, 2 P. Wms. 263.

“ Mr. Collinson states, that it was the general practice of Sir William Pepys, a Master in England, not to appoint the heir at law. In a case in which he had rejected the heir, Lord Eldon appointed him.” And in our own court, the old rule has been expressly contradicted. 7 Vesey, 591.
1 Collinson, 207.

The petitioners for the custody of the person and estate were the daughter of the lunatic and her husband. The Chancellor said, he agreed with Lord Macclesfield in Dormer's Case, that there was no sufficient reason for the old rule against committing the custody of the person of a lunatic to the heir at law ; and appointed the petitioners.” The next of kin, not being the heir at law is most favoured for this appointment. In the matter of M. Livingston, 1 John. C. C. 436.
1 Collinson, 110.

“ On a petition of two of the lunatic's next of kin to be appointed a *committee of the person*, Lord King observed, that the old rule as to an heir at law prevailed much less now than formerly ; but that a person was *next of kin*, so as to be entitled to a share of the personal estate, was not an objection, nor did he remember it ever to have prevailed as such ; for the personal Ex-parte Ludlow, 2 P. Wm. 636.
See also Neal's case, Ibid. 545.

estate probably would be increased during the life of the lunatic, and it was consequently for the advantage of the next of kin to be careful of his life." Certainly this reason is strong where the next of kin is committee of the person, and not of the estate.

Strangers may be appointed in preference to relations, if there are good reasons against the latter.

Lady Cope's
case, 2 Chan.
C. 239.

"A stranger had been appointed committee of the person of a lunatic. The sister petitioned for the custody.

Lord Chancellor said,—It is no question of right, but of prudence. It shall never in this or any case, be committed to one who will make a gain of it; and the sister, though she be not entitled to the estate, yet is concerned to outlive her, for thereby she will be entitled to the estate. It was pressed that the stranger might be stinted in his disbursements. Lord Chancellor said, that should be decided when the account was taken, the allowance should be liberal."

It may be observed, that if on the one side, the next of kin is interested in preserving the lunatic's life to increase the personal estate; on the other, he is interested in limiting the allowance and expenses for his support. It must therefore be a matter of discretion chiefly depending upon the character of the applicant.

1 P. Wms.
702.

A married man *non compos* should be committed to his wife, and *e converso*, unless there are strong reasons against it; but in the case of a husband *non compos*, it is advisable to associate some one with the wife.

Ex-parte
Le Huop,
Aug. 1811.
cited 1 Col-
linson, 214.

"The Master had approved of the wife of the lunatic, together with his uncle, as committee of the person. On a petition by the mother to be appointed, Lord Eldon refused it, and observed, notwithstanding the respect every member of the family bears Mrs. Huop, and to which she seems entitled, I should be sorry to expose her to the consequences of being sole committee, for in that situation where affection must be tempered with firmness, people are often under the necessity of doing what is most unacceptable to the lunatic, and yet essential to his recovery, and when they are restored to reason, they will sometimes entertain a rooted and unjustifiable dislike to those who have pursued a line of conduct ungrateful to them, without which their recovery might never have taken place. The Master therefore has done right in not approving of Mrs. Huop to be the sole committee.

3 P. Wms.
111. 3 Vesey,
2. 2 P. Wms.
638.

A *feme covert* may be appointed committee of the person, but it is usual to join the husband with her. If the lunatic is

an unmarried female, the custody of her person should be given to one of her own sex.

Lord King discountenanced appointing two to this office, but it has been since repeatedly done.—The committee of the estate may be appointed committee of the person.

2 P. Wms.
638.

1 Collin. 227.

Ibid. 228.

Any antipathy of the lunatic to the person proposed should be attended to in this appointment.

6 Vesey, 427.

COMMITTEE OF THE ESTATE.

ANY person stranger or relative may be made committee of the estate.

1 Collinson;
253.

It lies in the sound discretion of the Master and the court.

Neal's case,

But a relation, *cæteris paribus*, should be preferred.

2 P. Wms.

544.

“The Master had approved of Mr. Benjafield a stranger, committee of the estate, in preference to the lunatic's uncle and another, who had been proposed.—Both were unexceptionable. Lord Eldon said,—When strangers are appointed they acquire an influence over the private and domestic concerns of a family, which ought always, if possible, to be restricted within the circle of the family itself.

Ex-parte;
Le Huep.

The report was sent back to be reviewed.”

The heir at law is most favored in this appointment, on the supposition, that he has the greatest interest in taking care of the property.

1 B. Com.
304.

A Master in Chancery ought not to be appointed committee of the estate, on account of the impropriety of one master passing the accounts of another.

6 Vesey, 470.
ex-parte
Fletcher.

SECURITY.

IT is our practice, as is shewn by the order, for the master to settle the amount of security, and approve of the sureties at the time of approving the committee. In England the Attorney General performs these duties, and it is done after the approval of the Master has been confirmed by the court, under an order then made.

1 Collinson,
263.

1 Collinson,
262.

As to the amount Mr. Collinson states,—“ That the committee enters into a recognizance with two responsible persons as sureties in double the amount of the annual rents and profits of the estate, and of the outstanding property, for answering and duly accounting for them once a year, or oftener if ordered.”

1 Turner,
676.

Mr. Turner states,—“ That he must give security by two respectable persons, in double the sum, at which the rents of the estate, and the *income* of the lunatic's property, is computed.”

The most natural construction of the rule as stated by Mr. Collinson is, that the security must be in double the whole amount of the property other than real, and double the annual rents of the real, and this is the amount generally required in our practice.

Greater security should be required here than in England, where the committee is strictly called to account and to pay in his balances yearly.

As to rents of real estate, the amount according to the value of the lunatic's life might be taken.

1 Turner,
676.

In order to diminish the security, an application may be made, that part of the outstanding estate may be called in, and invested in the court of Chancery ; and this may also be done at any time after the bond is entered into, and no doubt upon the application of the sureties.

1 Collinson,
263.

Mr. Collinson states, that the Attorney General will seldom approve of sureties objected to by any of the parties interested.

1 Turner,
698.

The sureties as before mentioned make an affidavit of their sufficiency, which is laid before the Master. See the form Appendix, No. 44.

APPROVAL OF BOND.

WHEN the report has been brought before the court, and confirmed, (which is done by petition) an order is made that the person approved be appointed the committee of the person and estate of the lunatic upon entering into a bond to be approved of by a Master of the court in the sum of £ conditioned that the said committee shall faithfully perform the trust. It does not appear essential, unless the order is

express in that particular, that the bond should be executed before the Master. It is sufficient to have it attested as in common cases.

In England indeed recognizance must be taken before some particular officer, and recognizances in Chancery are generally taken before a Master; but this is on account of the binding nature of such instruments, being a lien upon all lands from inrollment as against subsequent purchasers, and from acknowledgment, as against the party, if inrolled afterwards *nunc pro tunc*. Here it is merely a bond to the people.

Viner's Abr.
Tit. Recognizance. A. 1.
2 Vernon,
234. 750.

The draft of the bond being submitted to the Master he will approve or alter it, as he deems proper; and when settled, will indorse his certificate of approval upon it. See the form of the bond and certificate. Appendix, No. 46.

CAP. IV.

SECTION 2.

MAINTENANCE OF LUNATICS.

IT is the English practice to fix a certain sum as an allowance for the maintenance of the lunatic, which is ascertained by the Master.

In passing the committee's accounts, this sum is allowed without proving the items of disbursements. If there is a separate committee of the person, it is paid to him.

It must be remembered that the principle of the court, in making this allowance is, to give the person who provides for the lunatic, a liberal compensation for his expenses and care, not to repay him merely his actual disbursements.

2 Chan. cases,
239. 1 Harr.
Prac. 505.

If the party misapply this allowance, the remedy is by application to the court for his removal, and in England the situation of the lunatic and of his estate being annually brought before the Master, and his relations summoned to examine into the conduct of the committee, there is a supervision insured that must tend greatly to prevent improper conduct.

The prayer for maintenance should be included in the petition for the appointment of a committee, to save expense, and it is often so done. In most of the precedents in *Collinson*, however, the order of reference to settle the maintenance is made

1 Turner,
698. n. (b)

2 Collinson
passim.

upon the confirmation of the report of approval of the committee.

If the order for fixing maintenance is included in the order for approval of a committee, it is merely necessary to add to the proposal, a proposal of a certain sum for that purpose.

The amount of the lunatic's fortune is before the Master in the state of facts.

The allowance of maintenance should be liberal according to the lunatic's fortune.

Ex-parte
Baker, 6

Vesey, Jr. 8.

The lunatic has an income of £1700 a year, and had been placed in a private mad-house, when he had no fortune. His disorder was imbecility of mind. The Master allowed £300 per annum. On exceptions, Lord Eldon said,—The allowance was too small; and that the lunatic with his fortune, might be rendered more comfortable. He thought he should live in a house of his own, under the care of some relation. It was referred back to the Master to review his report."

1 Vesey, Jr.
296.

In Ex-parte Chumley, Lord Thurlow said,—“Next of kin and expectants are entitled to no consideration, but the lunatic should have every comfort his situation will admit of.”

2 Coll. 552.
In matter
Geo.

The whole income if necessary may be allowed.

CAP. V.

SECTION 1.

APPOINTMENT OF A RECEIVER.

Prac. Regls.
355.

A RECEIVER is a person appointed by the court to collect and receive the rents and profits of land, or the produce and profits of other property, in question in the cause. His appointment constitutes him an officer of the court.

1 Cooper's
Rep. 42.
Equity Draft.
604.

A motion should be made on notice for an order of reference to appoint a receiver.

The order runs,—“That it be referred to, &c. to appoint a receiver of the rents and profits of the estates in question in the cause, and to allow him a salary for his care and pains therein; such person to be appointed receiver, first giving security, to be allowed of by the Master, duly and annually to account for what he shall so receive, and to pay the same as the court shall direct. And the tenants of the estate are to

attorn and pay their rents in arrear, and growing rents to such receiver, who is to be at liberty to let and set the estate with the approbation of the Master; and that the said receiver do pay the clear balance of his account from time to time into the bank with the privity of the Accountant General to be placed to the credit of the cause."

Regularly a proposal and state of facts should be laid before the Master, describing the person offered for the appointment, and his sureties, and the situation, nature and value of the estate, or its yearly produce. These facts should be verified by affidavit. (See the form, Appendix, No. 47.) A summons should then be taken out and served, underwritten,—“To proceed upon the state of facts, &c.”

An affidavit of the sureties should also be brought in, as to their sufficiency. That each of them is worth double the amount of the yearly rent of the estates, or other income in question, after all debts paid. Appendix, No. 48.

Or the sureties may be brought before the Master, and personally examined to that point.

In case of no opposition, the affidavit would be sufficient, but if opposed, no doubt the Master may reject the sureties, if they refuse to submit to be personally examined by the adverse party. The adverse party may bring in a counter proposal, and affidavits should be produced, or witnesses examined in support of the qualifications of the proposed parties.

A recognizance is also to be prepared for the receiver and his sureties.

This is done in the Master's office in England, and ought to be so here. The fee bill allows the Master fifty cents for taking and reducing to form in writing every recognizance entered into before him.

When the Master has approved the form he signs his allowance upon it. The recognizance in England is taken to the Master of the rolls, and the Master making the appointment.

In the Exchequer it is acknowledged before a baron, or commissioners appointed for that purpose in the country.

The receiver and his sureties must personally attend the Master, and enter into it before him. (For the form of the recognizance, See Appendix, No. 50.)

By the English practice, a report is prepared of the approval of a receiver, and allowance of recognizance first; and after the recognizance is executed, a report of the appointment is made.

I cannot perceive the necessity of these two reports, and by our practice there is but one.

It must be noticed, that the reference is for the *appointment* of a receiver, not to approve of a person, whom the court afterwards appoints, as in the case of a guardian or committee.

The report of the Master states the proposal of the receiver and his sureties, the allowance of the recognizance, and its being entered into before him, and that he has appointed the person receiver. (See the form, Appendix, No. 49.)

1 Turner,
250.

The usual warrants are taken out, when the report is prepared in England, but not with us : when the Master is satisfied, he delivers the report at once.

The following persons are legally disqualified from being appointed receivers.

11 Vesey,
384.

1st. *Trustees.* Lord Eldon in *Sykes v. Hastings*, says,—The general principle is, that the person who accepts the office of trustee engages to do the whole duty of receiver without emolument. That is useful, as the court, appointing a receiver, looks to the trustee to examine with an adverse eye, to see that the receiver does his duty. The consequence is, the case of appointing a trustee to be a receiver is extremely rare, and only where he will act without emolument. The principle of the court is, that a trustee shall not be the receiver if any other can be procured."

Ex-parte
Fletcher,
6 Vesey, 427.

2d. *A Master in Chancery.*

3d. *A Solicitor in the cause.* 2 Vesey, Jun. 137.

See 15
Vesey, 285.

Solicitors or attorneys not in the cause, are not absolutely disqualified, but Lord Eldon has stated, "that the circumstance of a party proposed being a practising barrister, deserves serious consideration." And Lord Thurlow has expressed an opinion, "that all professional persons are improper.

Cruise v.
Bishop of
London, 2
H. C. C.
255. 1 Tur-
ner, 250.

The Master need not state his reasons for the appointment. The costs of the appointment are to be paid in the first instance by the receiver, and he is allowed them on passing his accounts.

Where the estates lie at a great distance from each other, two receivers may be appointed.

SECTION 2.

See 1 Vesey,
Jr. 139. 165.
1 Ball &
Beatty, 189.

The rules of the English court were formerly very strict in not allowing the receiver to make leases or even repairs without a *previous* approval of the Master. But our court would

undoubtedly sanction when performed, what it would have directed to be performed : and it is the constant course for officers of this description to perform their duties without the previous approval of the court.

6 Vesey,
769. 802. 11
do. 563.
2 Merivale,
36.

CAP. VI.

SECTION 1.

PASSING ACCOUNTS OF GUARDIANS, RECEIVERS,
AND COMMITTEES.

THE present subject is treated in the English court, as one of such great importance, and has been so little attended to here, that I have entered more largely into it, than its connection with my plan appears to demand ; being strongly impressed with a conviction of the great benefits which would result from adopting a stricter system.

By the forty fourth rule, it is directed, that all guardians, receivers, and committees of lunatics or idiots, if the clear annual value of the estate committed to their management exceeds the sum of £300, shall once in every year, and if of a less value, once in every three years, exhibit to the court, and file with the register, or assistant register an account of their guardianships, or other trusts, and of the balance of money, that may then be in their hands, respectively, that the court may take proper order for the disposition and improvement thereof. And the register or assistant register is ordered to furnish each guardian, &c. with a copy of this order."

Rule, 44.

As to committees and receivers, in England, the order of appointment directs, that they shall pass their accounts annually, and it is made also part of the condition of the recognition. This excites the attention of the sureties.

3 Collin.
392, 393.
1 Ibid. 304.
Eq. Draftsm.
604.

By an order of the 25th July, 1792, it was declared, "that the Lord Commissioners, taking into their consideration the necessity of having the accounts of committees and receivers of lunatic's estates regularly passed, and the means of preventing such accounts running in arrear, did think fit, and thereby order, that the Masters of the court should, on the last seal after trinity term in every year, certify to the Lord Chan-

Beames
orders,
453. n. (2)
Beames
orders,
453.

cellor, &c. the state of the several committee's and receiver's accounts in their respective offices."

Beames
orders,
452.

A general order, directing in like manner the Masters to certify the state of all *receivers'* accounts in their respective offices, was made on the 15th December, 1792.

Ibid. 461.
and 1 Turner,
700.

And the following order respecting receivers was made on the 23d April, 1796. "It appearing from the returns made by the Masters in Chancery, that many receivers of estates appointed by the court, have not been punctual in passing their accounts, and paying in their balances due thereon, as they ought to have been. Therefore it is ordered, that the several masters of the court shall hereafter fix days on which all receivers in their respective offices shall annually procure their accounts to be delivered unto the Masters, and also the days on which such receivers shall pay the balances appearing due on the accounts so delivered in, or such parts thereof, as the master shall certify proper to be paid by them. And it is farther ordered, that with respect to such receivers, as shall neglect to deliver in their accounts, and pay the balances thereof, at the times to be fixed for that purpose, the several Masters to whom such receivers are accountable shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge interest at 25 per centum upon the balances so neglected to be paid by them, during the time the same shall appear to have remained in the hands of such receivers. And further that every receiver shall each year procure his annual account of receipts and payments, respecting the estate to be examined and settled by the Master, within the space of six months next ensuing the time appointed by such Master for delivering of such accounts into his office; and in case of neglect, a certificate of the default is hereby required from the Master in whose office such neglect shall happen."

The following cases shew the strictness of the court upon this subject.

Fletcher v.
Dodd,
1 Vesey Jr.
85.

This was a case before the above order. "The Lord Chancellor said,—I will make a receiver pay interest, if he keeps money in his hands a quarter of a year after it ought to have been paid into court. Let the master compute what money was in his hands at the time it ought to have been paid into court, and compute interest from that time at the rate of 4 per cent."

Potts v.
Leighton, 15
Vesey, 275.

"The receiver was one of personal estate, and his bond was to pay the money in as before ordered, or afterwards to be di-

rected. The order appointing him directed it to be paid from time to time. The Master reported upon his accounts, that he found several sums to have been received in October and December 1804, and retained to the end of 1806, when he made a payment. The Master disallowed his claim of one shilling in the pound for his salary, and submitted whether interest should not be paid for each sum from the time it was received. Lord Eldon confirmed the disallowance of the salary, but decided that as this receiver was not like one of the rents and profits, who was recognized to pay in annually, that he should not be charged with interest from the time the money came to his hands, but like an executor, having regard to the circumstances of the retention."

"A receiver not paying in at the proper period, may either be moved against for a commitment, or his bond may be put in suit." Davis v. Craycraft, 14 Vesey, 141.

The decisions of the court are equally rigorous with regard to committees, though there is no general rule similar to the above relating to receivers. "The balances remaining in the committee's hands, after passing his accounts, ought in general to be laid out in the purchase of bank 3 per cent. consolidated annuities in trust to the matter of the lunacy." 1 Collinson, 304.

"The committee of a lunatic upon paying his accounts for several years together, applied for costs. Lord Thurlow,—I will not give him costs. If a committee desires costs, he must pass his accounts regularly as he ought. The negligence of a Committee, in not passing his accounts regularly is alone a reason upon which I will always refuse him costs." Ex-parte Clark, 1 Vesey, Jun. 296.

"Petition by a committee to pass his accounts before a Master. Lord Chancellor,—The thing has run into so much abuse lately, that I will never suffer a committee to pass his accounts without referring it to a Master to see what sums of money he has had in his hands from time to time. I must not allow a committee to keep money in his hands without paying interest for it. Therefore let that inquiry be made." Ex-parte Cattin, 1 Vesey, jr. 156.

"Petition to pass accounts.—The Master had reported above £2000, savings from the personal estate made by the lunatic's brother the petitioner before the commission was taken out. Ex-parte Chumley, 1 Vesey, jr. 156.

Lord Chancellor,—He means to pay interest I suppose.

The Solicitor General said, he had made no use of it.

Lord Chancellor,—But he ought to have made use of it. If he has been provident in not doing so, that will be something. Let the Master state any particular circumstances."

The interest given is 4 per cent.

In Matter of
Lacy, cited
in 1 Colinson,
306.

"The committee having preferred his petition to pass his accounts for several years together, Lord Thurlow directed the Master to make annual rests, and compute interest on the balances appearing due from the end of each year to the date of his report, at the rate of 4 per cent. *per annum*.

Sheldon v.
Fortescue, 3
P. Wms. 105.
Ex-parte
Pickard, 3
Vesey & B.
127.

Where the whole income is allowed for maintenance the committee is not compelled to account, unless fraud appear.

"In a case where the surplus, after retaining the annual allowance was not sufficient to bear the expense of annually accounting, being but £8. On petition it was ordered that the sum annually received by the committee might from time to time when received, be paid into the bank, (the amount to be verified by the affidavit of the committee) and that the order directing the committee to pass his accounts annually, be dispensed with."

Such are the regulations of the court upon this subject in England.

In Ireland, Lord Redesdale appears to have taken it into very deliberate and anxious consideration, and has framed a rule of great utility, and admirable precision.

2 Sch. and
Lefroy, 732.
Appendix.

This rule extends to guardians, receivers, and committees, appointed in any manner whatever. Its provisions are these in substance. After reciting that several such persons have neglected to account, and that many instances have of late appeared, of gross misconduct and neglect, as well in such persons, as in their solicitors, and solicitors for minors and others, who ought to have taken care that such accounts were duly passed, whereby great loss has happened to the parties interested, and the securities have been put in hazard, and in some instances have been obliged to pay for the default of their principals, and considerable costs have been incurred, it directs, that the Masters in whose offices such persons ought to account, do take care, that they be required to account from time to time at the direction of such Masters, according to the circumstances of their respective cases, and the value of the property; and such accountable persons shall account at the times of the Master shall so direct.

That the Masters make lists of all accountable persons in their respective offices, the nature of their appointment, time of their appointment, and time to which they have accounted, the securities, and the balances in hand, if any, on their last passing their accounts. That if the Master deems any person should account, he may, of his own authority, or at the instance of any person he shall think competent to apply to him touching

the same, issue a summons to the accountable person, requiring him to account within a certain period, limited in such summons; and shall direct it to be served by such person's solicitor or agent in the matter, or if he cannot find him, or think him not likely to proceed diligently in compelling the account, the Master may direct the summons to be served and proceedings to be taken, by any other solicitor; that if such person do not duly account, upon the Master's certificate of such default, an attachment shall issue against him as of course; and if the Master shall so direct, the recognizance shall forthwith be put in suit. It further directs, that lists of all accountable persons should be put up in the Chancery office, to apprise the sureties of the hazard they incur. That the Masters in passing receivers' accounts inquire into their diligence in the office, and if neglectful, do not allow them poundage, or moderate the allowance; or if guilty of delay in accounting, the Master may refuse to allow his costs or poundage, or may report the matter specially with his opinion thereon; that the court may order costs, or discharge him, as circumstances require."

The evils arising from a neglect to call such persons frequently to account, and requiring the payment of their balances, are strongly displayed by Lord Eldon.

"Motion to discharge a receiver, and that he should pay interest on the balances in his hands. *Fletcher v. Dodd*, was cited. Jolland, 8 Vesey, 72.

"*Lord Chancellor*,—I am glad to find Lord Thurlow has stated, what is expressed in the case cited. I will have receivers know, that if they do not pass their accounts, they shall always pay interest.

I have been informed by several of the Masters that this ease has frequently happened. A receiver passes no account during the whole minority; and just when the infant becomes adult, tempts him with a large balance. An amicable bill is filed. The young man consents, and so the receiver passes no account whatever, pays over the balance, and pays no interest."

In *Potts v. Leighton*, Lord Eldon makes similar remarks. 15 Vesey, 274.

The passing of accounts is in our state very much neglected, and the rule itself is not sufficiently strict to ensure the safety of the fund. In effect it is merely an advantage to the accounting party, by stating an account for him, frequently under the inspection of a Master, which probably can only be surcharged and falsified afterwards. It is not in any manner serviceable to the objects of the trust. It is not brought before the court

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by an adverse party. The court in almost every case, is entirely ignorant of the state of the account, and the balances remain in the party's hands, subject to the peril of a change in his circumstances, or his misapplication. If it is found so important to press such accounting parties with great vigilance in England, where the recognizance binds all the lands of the cognizor from its inrollment ; much more essential is it here, where this security does not exist, where the facilities of passing property out of the reach of creditors are so great, and where the fluctuations of responsibility are so rapid.

It may be suggested whether a set of rules similar to the following would not be beneficial.

That the order made, and the recognizance entered into, upon the appointment of every guardian, committee of lunatics, and receiver, should contain a provision, that he account (*annually, or every two or three years*, according to the amount of property) and pay in the balances in his hands, or such part thereof as the court shall direct.

That the guardian, &c. account in the office of the Master, by whom they were approved of, except otherwise specially directed.

That the Master appointing a guardian, &c. shall at the expiration of every year, (or other time according to the period fixed for accounting) issue a summons requiring such guardian, &c. to produce and prove his accounts before him, at a certain time to be fixed in such summons, and direct the same to be served upon the party by a solicitor to be chosen by the Master, *not being the Solicitor prosecuting the appointment.*(a) That notice of the time of passing the accounts be given to such persons, as would be entitled to a distributive share of the lunatic's or infant's estate, if he were dead intestate, or in the case of a receiver, to the parties in the cause, and also to the sureties of such accounting party.

That after the accounts are passed, the guardian, &c. pay in their balances, or so much thereof as the Master reports should be paid in, within a time to be fixed in the report for

(a) This differs from the rule of Lord Redesdale. He directs the Master to require the proper solicitor or agent of the accountable party, to conduct the proceeding, unless he deem that such solicitor will neglect the duty, when he may select another. This discretion may be very proper in England and Ireland, where the Masters are honourably independent of the favour of solicitors, and receive their business immediately from the court. But in the situation of Masters here, it would be imposing a duty upon them, too often conflicting with their interests, to be exercised decisively.

such payment, after service of an order entered thereupon ; and that, upon filing the report, an order may be entered requiring the payment, according to the direction of the report.

The rule of our court does not require that the accounts of guardians, &c. should be examined and passed by a Master, directing only that they shall exhibit to the court, and file with the register, &c. an account of their trusts. It is a general practice however to pass them before a Master. This proceeding is *ex-parte*, though the Master may summon the next of kin, or parties in the cause, if he deem it proper. The Master examines the party, or receives sufficient evidence of the items of the account, and reports the amount of disbursements, of receipts, and the balance.

The accounts are sometimes stated by the guardian, &c. and filed without any examination by a Master, and of course without the privity of the court. I cannot perceive of what use this mode can be, even to the accounting party himself. It cannot obviate the necessity of treating his accounts as entirely open upon a final settlement ; whereas if he passes them regularly before a Master, who examines him upon oath, and inspects his vouchers, and reports that he has done so and is satisfied, I should think the court would afterwards treat it as a stated account, and only give leave to surcharge and falsify. This would unquestionably be the case, if the parties interested had been summoned to attend according to English rules.—And perhaps even against an infant himself, it would be considered as a settled account.

In the case of *Dawson v. Massey*, the bill was filed among other things to have the accounts of a guardian opened as fraudulent ; that the plaintiff might be at liberty to surcharge and falsify, specifying errors. The guardian had passed five accounts during the minority, which it appears were passed in the court of chancery. The bill was by the ward on arriving at age.

¹ Ball and Beatty, 219.

CAP. VI.

SECTION 2.

1 Turner,
701.

THE English practice in case of committees is, to present a petition for an order to pass the accounts.

The order directs, that it be referred to the Master to take the petitioner's account or further account of the lunatic's estate from the foot of his last account passed by said Master; to make all due allowances, and *that due notice of attending said Master be given to such person or persons as would be entitled to a distributive share of the lunatic's estate, if he was dead intestate.*

2 Vesey, 25.
Ex parte
Wright,
1 Collinson,
308.

Lord Hardwicke refused the next of kin their costs for attending, but the court has since considered it of so much benefit to have the scrutiny of persons interested in the fund, that it has altered his decision. Lord Hardwicke said,—“He would not allow them costs, because if every relation, who thought he had an interest to attend, should have costs, it would bring a great burthen on the lunatic's estate.” It is not probable this inconvenience would take place to any extent, as they would be exhausting their own eventual property; and it would be easy to correct it, by allowing but one bill of costs to one of the next of kin, except in a special case, as where another detected an important error, and augmented the fund.

If the Master is informed of the names of the next of kin, he may direct a summons to be served upon them immediately. If not he should require an affidavit stating them, to be laid before him.

The committee having brought in his accounts, a warrant issues, underwritten,—“To examine the accounts of the committee of the lunatic.” The next of kin can inspect the same at the Master's office, and obtain a copy, if he thinks proper. The accounts are then examined upon warrants to proceed upon them, or adjournments, as usual.

1 Turner,
702.

If the parties attending find any omission in the account, they may bring in a charge for the item. I presume however, if they wish to examine the committee, an order should be procured.

The committee must verify his account by affidavit; the form of which is given in the Appendix, No. 51.

This affidavit with vouchers for his disbursements are sufficient evidence, without proving the vouchers. The adverse

party must falsify the items, or at least render them suspicious.

When the report is prepared, the usual warrants are taken out upon it. For the form of the report, See Appendix, No. 52. ^{1 Turner, 658. Fee Bill}

Of course this is not done under our rule where the proceeding is *ex-parte*.

SECTION 3.

PASSING ACCOUNTS OF RECEIVERS.

THE receiver leaves a copy of his account at the Master's office. It exhibits the nature of the estate, rents, and income of the year, or other time for which he passes the account, his disbursements, charge for salary, and costs of passing his account carried out in blank. If it is the first passing, the costs of his appointment should also be included. ^{1 Turner, 261. 2 Fowler, 385.}

A warrant is then served upon the opposite party in the cause. The affidavit of the receiver to his account is also brought in, with proper vouchers for his disbursements. His bill of costs, as well as those of the plaintiffs and defendants, attending on the passing his accounts should also be produced. ^{2 Turner, 468.} The Master before whom the reference proceeds, taxes them in England. Here it would be necessary to have it taxed by the taxing Master before produced.

It is the habit of the Masters in England to enter the accounts passed before them in a book, instead of annexing them by schedules to their reports. The report alone is filed at the report office, and a party wishing a copy of the accounts must procure them from the Master. No such course has prevailed here; the accounts must be annexed to the report, and filed with the register or assistant register, whose privilege it is to make copies to be used in court. When the report is prepared the usual warrants are taken out upon it. ^{1 Turner, 261. Smith v. Smith, 2 Dickens, 789. 1 Turner, 63.}

The affidavit of the receiver and the report are similar to those upon passing the accounts of a committee.

The receiver must procure his accounts to be settled within six months after the time fixed by the Master for bringing them in. The Master fixes a day by which the balance must be paid into the bank, or such part of it as he directs.

Order 23d
April, 1796.

1 Turner,
258.

The salary allowed the receiver in England is £5 per cent. upon the gross rental of the estate, without regard to the receipts or arrears. This is the *maximum*, and where the rental is very large, a much smaller per centage has been allowed. Where the rents were £8000 in one case, the receiver was allowed £300. The Master's judgment upon the *quantum* is usually decisive. I am not aware of any instance in which the question has been brought before our court. The act directing an allowance to executors, &c. does not extend to it.

SECTION 4.

PASSING ACCOUNTS OF GUARDIANS.

I DO not find any thing in the English books under this head, nor can I explain why the general orders of the court relative to the passing accounts of receivers and committees, do not extend to guardians. But our own rule includes them, and the practice must be the same as upon passing the accounts of either of the other description of parties. The affidavit of the guardian on leaving his accounts is stated Appendix, No. 53. If the practice should be adopted, or the Master in a particular case should deem it necessary, to summon the next of kin to attend, the underwriting may be,—“To examine and pass the accounts of A. B. the guardian.”

The Master in such case may require an affidavit to be produced of the names of the next of kin.

For all disbursements vouchers must be exhibited, or proof of payment. The adverse party, if any attend, must throw some suspicion upon the vouchers or they should be admitted.

It is clear that the general rule of allowing an accounting party all sums under £20, and to the amount of £100, ought not to be applied in full extent to the passing of accounts at short periods, when the proof of payment, or procural of vouchers is easily within the party's power; otherwise in the greater part of cases, a guardian accounting annually need never produce a voucher, as his disbursements would not equal the sum allowed. It is proper however to observe that rule for such trifling disbursements as it is not usual to take a voucher for.

When the accounts are examined, the Master reports upon them, and delivers his report after issuing a draft and the usual warrants. By our practice where the proceeding is ex-parte, this of course is not done.

For form of reports, See Appendix, No. 53.

CAP. VII.

SECTION 1.

REFERENCE FOR ALIMONY AND EXPENSES OF SUIT.

UPON a bill for a divorce, whether filed by a husband or wife, the latter is entitled to a support pending the suit, and for a sum of money to carry on the proceedings on her part.

The cognizance of this subject, which belongs in England to the ecclesiastical courts, is given by statute of our state to the court of Chancery.

Burns' Ecc.
Law, 2.
460.
2 R. L. 197.

The practice of those courts, and that in cases in chancery of a similar character, such as maintenance, will afford the rules upon this subject.

The Court refers it to a Master to fix a proper sum.

The solicitor should lay before the Master a proposal and state of facts, setting out the fortune of the husband, and his yearly income, whether the children of the marriage, if any, are living with her, and any other material circumstances bearing upon the question of an allowance. It concludes with proposing a certain sum to be allowed, for alimony, and a sum for expenses. (Appendix, No. 54.)

In the ecclesiastical courts, these particulars are propounded in the libel, and upon the answer of the husband coming in, the Judge assigns the alimony; or he examines the neighbours of the husband *viva voce*, as to his circumstances.

Cockburn's
Clerks' Asst.
122.

Upon filing the state of facts a summons should be taken out, and served as usual.

As to the costs, the proctor ^{prepares} ~~prepares~~ a bill which the judge taxes. The Master, if that point is litigated, should require the solicitor to do the same, and as to uncertain items, as number of witnesses to be examined, &c. he may judge with as much

Floyers'
Procts. Prac.
50.

accuracy as possible, from the statement, by affidavit if required, of the solicitor or party.

When the report is prepared, a summons to peruse the draft, and to settle it should be taken out, if the adverse party appear and contest before the Master. See Appendix, No. 55.

"Alimony signifies that proportion of the husband's estate, which by the sentence of the court, is allowed the wife for her maintenance, (upon any separation from him) *pendente lite*."

Separation is the foundation of the claim for alimony.

The wife cannot sue for it during cohabitation.

It is laid down, "that no alimony can be decreed but by consent or *pro expensis litis*, unless there be first a decree for separation." This position is placed upon the case of *Whorewood v. Whorewood*. An examination of that case will I think shew that the position is this; that the husband by allowing a separation, consents to alimony, and may at any time previous to a decree stop the allowance, by offering to cohabit, and support the wife, and may compel her *ad obsequia debita*; and thus the alimony is decreed, or continued by consent.

In that case the decree was for an allowance to the wife, till they cohabited and during separation.

"The husband offered to cohabit, and to use her as his wife, and the court suspended the alimony, that she might return and make trial; and said it would hear the wife's complaint with favour, and lay on the decree again, if there were cause."

This case was before the commissioners of the great seal, during the civil wars. The ecclesiastical courts being suspended, jurisdiction was specially given to them.

Alimony is given from the time the citation was served or returned. "According to practice, in the first instance, alimony is allotted from the return of the citation, yet this is not absolutely binding, for Clarke lays it down, that it shall be allotted either from the date or from the return of the citation. (Citing Clark's Praxis. Tit. 35.) This leaves it in the discretion of the court, and very properly. If diligence is used in the return of the citation it may be sufficient to allot from that time, and which is now the general practice, for till then she may be able to obtain subsistence on the credit of the husband."

By analogy to this rule, the Master should allow alimony from the return of the *subpoena*.

In *Mix v. Mix*,—alimony not being prayed by the bill, but by a petition after it was filed, it was granted from the date of the petition.

Floyers'
Proctors
Prac. 50.

1 Rolle's Rep.
110. Croke,
Car. 220.
Viner Tit.
Baron &
Feme, (x. a)
Floyers, 51.
Cockb. C. L.
Ass. Part 2.
14. 1 Chan.
Cases, 250.

Cockburn,
122.
By Sir John.
Nicholls in
Loveden v.
Loveden,
2 Philimore's
Reports, 208.

1 Johns. C.
C. 108.

"It is assigned *pendente lite*, at the rate of so much per week to be paid *usque ad finem litis*." Floyer's
Prac. 50.

By our practice generally, the allowance is given monthly. As to the proportion allotted, the general rule of the ecclesiastical court is "to assign a third or at least a fourth part of the yearly value of the husband's real estate; and if he hath none, to tax him according to his dignity, and the common fame of his personal fortune." 1bid.

This rule seems derived from the amount of the dower right of the wife, and as to personal property, perhaps an analogous one, derived from her interest under the statute of distributions if her husband were dead intestate, would be proper; that is, to allow a moiety or one third, as there are children or not, of the yearly income of that property.

"The defendant was an officer in the navy, in the receipt of about seventy dollars a month. There were no children of the marriage, and the chancellor allowed the wife thirty dollars per month." Mix v. Mix,
1 Johns. C.
Rep. 109.

In *Denton v. Denton*, it appeared from affidavits, that the husband was worth above \$200,000. The chancellor ordered a monthly allowance of \$100 to the wife; and a deposit of \$250 for her costs." Ibid, page,
384.

The affidavit of the wife is evidence in the first instance. "In *Mix v. Mix*, the Chancellor made an allowance for Alimony upon petition of the wife, setting out the husband's income and sworn to." Ut supra.

CAP. VII.

SECTION 2.

REFERENCE TO TAKE PROOF OF ADULTERY.

IT is provided by the statute, that if the defendant to a bill for divorce, shall by answer admit the Adultery, or if the bill be taken *pro confesso*, it shall be the duty of the court, before pronouncing a decree of dissolution, to refer the same to a Master in Chancery with directions to take the proof of the adultery charged in the bill, and to report the same to the court with his opinion thereon, and the cause shall be heard 2. R. L. 198.

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upon such proofs and report previous to a final decree therein.

The order in this case usually is,—“That it be referred to one of the Masters of this Court to take proof of the fact of adultery charged in the complainant’s bill, and to report to the court the proofs which he shall so take together with his opinion thereon, in writing.” Sometimes it directs the Master to take proof of the material facts charged in the bill of complaint.

This order cannot be entered of course.

The order and bill should be left with the Master, and if the defendant has appeared, a summons must be served which may be underwritten,—“To take proof of the adultery charged in the bill.”

The witnesses’ testimony must be reduced to writing, and signed by them. It is usual to annex the originals with the witnesses’ signature, to the report, though perhaps certified copies by the Master would suffice.

And if the reference is contested, the draft of the report should be prepared and settled as usual.

There are some points on this subject of importance.

Sect. 1st.
2 R. L. 197.

The jurisdiction of the court is given by the following section of the statute concerning divorces. “That it shall and may be lawful in all cases of adultery, by a husband or a wife, *they being inhabitants of this state at the time of committing such adultery*, or when the marriage shall have been solemnized or taken place within this state, and the party injured by such adultery, shall be an actual resident in this state at the time of the adultery being committed, and at the time of exhibiting the bill, for such injured party to exhibit a bill in the court of chancery, praying a divorce, &c.

Mix v. Mix,
1 Johns. C.
C. 204.

The first clause of this section gives jurisdiction upon the ground merely of *inhabitation* within the state at the commission of the act. This is the only requisite circumstance. A removal after the commission would not take away the jurisdiction. Then the question is, what constitutes *inhabitation* within this clause. One point is whether the actually being in the state at the time is necessary. If the state should be the settled home of the parties, and the act be committed during an absence of a few days, plainly temporary, would the case be within the statute? If it would, then the question occurs, to what extent of time that absence may be protracted? May the parties, natives of the state, reside in a foreign country any number of years, clearly however with the intention of returning to the state, and treating it as their home,

the act being committed abroad ? It seems difficult to find any precise rule as to the length of absence. The extremes of the subject are, whether actually being in the state, as well as its being a permanent residence on the one side is necessary, or whether the mere fact of this having been the settled home of the parties, and of their continuing to regard it as such, and intending to return is on the other side, sufficient.

It is clear that *actually being in the state* is not all that is necessary. There must be *animus manendi*, the regarding it as a permanent residence. In this particular the term is the same as a *domicil* when applied to the succession to personal estate. See Williamson v. Parisien, 1 John. C. C. 392,

Whether the term may not be taken throughout as synonymous with *domiciliated*, is fit to be inquired into, as that would afford some fixed rules.

The leading case determining the meaning of that term with regard to succession, is *Somerville v. Somerville*.

One rule there established is, that the original domicil, or the *forum originis* is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil. The domicil of origin is not that of birth. The accident of birth in a particular place does not affect the domicil. The infant's domicil is that of his father. 5 Vesey, J. 750.

Next, That the domicil of origin continues during pupillage. No domicil can be acquired, till the person is *sui suris*.

Thirdly,—What shall amount to a manifestation of an intention of taking another as a sole domicil is necessarily a matter of uncertainty. The Master of the Rolls applauds *Bynkershock* for not hazarding a definition, and treats that of the civil law as vague. That definition as quoted in the case is,—*Ubi quis larem rerumque ac fortunarum suarum summam constituit*. The residue of the passage is,—*Unde rursus not sit discessurus, si nil avocet ; unde cum profectus est, peregrinari videtur ; quo si rediit, peregrinari jam destitit*. L. 7. C. De Incol Domats civil law, 2. 484.

It is difficult to suppose, that the term *inhabitants* in the act is to be held the same as *domiciliated*, and subject to these rules. If so, a case of a person whose domicil of origin was in this state, residing in foreign countries ten or twelve years, but with the clear intention to return here, and treating it still as his domicil, marrying abroad, and his wife there committing adultery, would be within the jurisdiction of the statute. No objection could arise from the wife's being a foreigner, as her

legal residence would follow that of her husband. So extreme a case cannot be within the act.

On the other side, if actually being within the state is indispensable to constitute an inhabitant within this clause, a strong case may easily occur in which the law would be flagrantly evaded, and public morals offended. A man might continue the commission of his crime in a neighbouring state, while he pursued his occupations, and was in all respects a citizen of this state.

I therefore conclude that by the true construction of the term, it neither requires actually being in the state at the time, nor is synonymous with *domiciliated* merely. But that there must be a residence (such perhaps as would gain a settlement) which is consistent with a temporary absence; and that residence must be combined with the intention of remaining.

The second clause of the statute giving jurisdictions is:—
“When the marriage shall have been solemnized or taken place within this state, and the party injured by such adultery shall be an *actual resident* in this state at the time of the adultery being committed, and at the time of exhibiting the bill.”

It would seem that the legislature intended to make a distinction as to the degree of residence in the state, necessary in the two cases of jurisdiction. Where the marriage has taken place here, the phrase is *actual resident*, applied to the injured party; and this residence is to exist both at the commission of the act, and at the filing the bill. Where the case depends merely upon the period of commission, the term *inhabitants*, applied to both parties, is employed. If the terms are equivalent, more is required to give jurisdiction in case of a marriage here, than when in another state, viz. residence at the filing of the bill. This could scarcely have been intended. Our court however has given a construction to the term, contrary to the distinction I suppose. In *Williamson v. Parisien*, the case was this,—The marriage had been solemnized in New York. The plaintiff, the husband was absent about eight years, when the wife married, and continued in the marriage state, with the second husband, to the time of filing the bill. The plaintiff returned shortly after this marriage to New York, and soon left it again, and was absent about twenty years. He had a house of trade in Jamaica, where he resided. He had been in New York, as it appeared by the testimony about two or three months before filing the bill, and then was there.

The Chancellor said,—“The party suing for a divorce must have become an inhabitant, and taken up his residence here with a *bona fide*, and permanent intent. There must be the

¹ John. C. C.
392.

animus manendi, or a train of conduct and acts, shewing an intended settlement here, before he can bring himself within the policy as well as the language of the statute. I find sufficient reason for dismissing this bill simply on the ground of a *want of domicil* here at the commencement of the suit."

If this case interprets the statute correctly, I cannot understand why the legislature varied the term from *inhabitant* to *resident*.

By the tenth section it is provided,—“That wherever a *feme covert* shall exhibit a bill against her husband by virtue of the act, she shall not be deemed a *resident* or *inhabitant* of any other state or county, merely because her husband shall reside or inhabit in such other state or county, but her being an inhabitant of this state shall be determined by the fact of her abiding in this state.”

Although in this section, the term *inhabitant* is employed in contradistinction to *resident*, yet certainly it cannot apply to a case under the first clause of the act, requiring both parties to be inhabitants at the time of the commission.

It could not have been intended to repeal this clause, as to the wife, and render her abiding here, all that is necessary.—If so the court would have jurisdiction, in case where the marriage was solemnized elsewhere, the adultery committed by the husband elsewhere, and he an inhabitant of another state; the wife being transiently here at the time of the act. It cannot apply to the case of a permanent removal after the commission of the act, this state being at that time their habitation, because that fact alone would be sufficient.

It would have been applicable, if inhabitation at the *filing of the bill*, was requisite under this, as well as under the second clauses.

The section seems to operate merely to remove all difficulty under the latter clause in a case where the husband living in another state, and committing the adultery there, (or committing it here, and removing before the bill was filed,) might defeat the suit of the wife; it being a principle that her legal residence follows that of her husband.

Dormat, 2.
486. 5 Vesey,
787. 1 John.
Rep. 432.

The case of *Mix v. Mix*, supports these positions.

1 John. C. C.
204.

“The plaintiff, the wife, a native of Great Britain, married in England. The bill alleged that the defendant at the marriage was an inhabitant of the State of New York.—That he returned to the United States to seek employment.—That she followed him, and now resided in New York.—That he, since his arrival in the United States had committed adultery

with I. H. of the *City of New York*, in or about the month of February, 1814. On demurrer the Chancellor said,—To give the court jurisdiction in this case it must appear that the parties were inhabitants of this state at the time of committing the adultery. It does appear that the plaintiff (who is the injured party) was an actual resident ; but that is not sufficient, as the marriage was not solemnized here. It must then appear that *both parties* were inhabitants of the State at the time of the adultery charged ; and this fact is not expressly averred, nor does it distinctly and certainly appear as to the defendant. The bill is not sufficiently clear on this point to give the court jurisdiction."

The adultery must be proved as charged in the bill, but it is sufficient to state it with reasonable precision.

The statute is, that the court shall refer it to a Master with directions to *take the proof of the adultery charged in the bill*. This provision is similar to that in the preceding section upon awarding an issue, and upon that section the following case has been decided.

Codd v.
Codd, 2
John. C. C.
224.

"Bill for divorce,—Charge,—That the defendant hath in numerous instances, both before and since their separation, committed adultery in this State and elsewhere.

On a motion for a feigned issue, the Chancellor said,—The adultery is not sufficiently specified in the bill to award an issue in pursuance of the statute, which requires that the adultery should be *set forth* in the bill. Here is not the least information or certainty, as to time, place, or person, and the defendant cannot know how to meet so vague an accusation."

Rule 51.

By a former rule of the court, it was directed, that on a feigned issue to try the fact of adultery, the confessions of the party were not to be admitted as evidence. This rule has been abolished. It did not extend to an examination of the facts before a Master ; and the Chancellor in the case *Belts v.*

Rule 84.

1 Johns. C.
C. 198.

Belts, observed, that he would not think himself warranted in saying, that the Master was not to take any proof of confessions of the party ; for the confessions of the accused is a legitimate species of proof which is recognized through the whole law of evidence. The party's confession may aid other proof, but the decree must not rest alone, nor perhaps essentially, on it ; for there is great danger of collusion between the parties, or of confessions extorted, or made designedly to furnish means to effect a divorce." The principle is found in the civil law. *Revelanti turpitudinem suam fides non datur.*

Floyer's
Proc. Prac.
48.

The rule as it now stands with us, as well as the reasons of it, are well stated in the following passage.

“ Quia nostris diebus (suadente diabolo) quam plurima pe-
 tuntur divortia propter adulterium ut eo colore sic seperati,
 valeant ad secundas nuptias convolare, et ut eo facilius hujus-
 modi divortium obtinere possint, uxor solet fateri adulterium,
 de quo collusorie accusator quamvis revera nullum fuerit com-
 missum, aliquando etiam maritus, ut ipse aliam possit uxorem
 ducere aut minis, verberibus, ~~claudis~~ aut aliquo alio modo
 illicito, inducet uxorem ad confitendum adulterium quamvis nul-
 lum commiserat, ad hunc igitur dolum et fraudem obviandum
 et evitandum, solet in his casibus ^{maritus} circumspectus iudex secreto
 semotis omnibus, præsertim ~~marito~~, indagare amicum mulier
 eamque sedulo examinare de veritate et causa hujusmodi confes-
 sionis, ac omnibus etiam viis et modis licitis veritatem percont-
 ari, et si dolum et fraudem hujusmodi reperire possit, vel sal-
 tem de eo aliquam probabilem suspicionem ~~habet~~, solet ab-
 stinere à pronuntiatione sententiæ divortii, nisi petens senten-
 tiam ~~divortii~~, adulterium objectum probaverit per testes vel
 saltem per vehementes præsumptiones vel famam publicam,
 vel aliter, iudicis conscientiam quod de veresimili objectum,
 crimen sit verum, informaverit, ex quo credat confessionem
 dictæ mulieris de adulterio commisso, non emanasse per do-
 lum ~~aut~~ fraudem.”

Clarke's
Praxis in
curiis Eccle-
siasticis.
Tit. 114.

SECTION 3.

THE Statute also directs that if the wife is com-plainant, and a decree of dissolution obtained, the court may make a further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage if any, and to provide a suitable allowance to the complainant for her support; and a similar provision is contained in the eleventh section, upon decreeing a separation from Bed and Board. Sect. 5.

The court usually makes an order of reference to a Master to ascertain the proper sum to be allowed under these sections.

The practice and rules upon such a reference are similar to those upon the reference to fix a sum for alimony. See ante.

It appears to be the most natural rule to consider the legal dissolution of the marriage by the decree, as equivalent to an actual dissolution by death, and to apportion the allowance to the wife by the same rule of distribution. This will be an equitable principle to proceed upon, as far as the property consists of real estate. The wife's rights cannot be affected by the husband's creditors, whether by judgment or otherwise.

But other considerations apply, where the property is personal. In case of death, the whole of this must be applied to the debts, if necessary. Where then there are creditors of the husband to a larger amount than his personal estate, can the wife be allowed any thing out of that fund, or with reference to it? In the first place the decree is personal for the payment of a sum, fixed indeed with reference to personal estate, but not decreed to be paid out of it, and no creditors have a legal lien or claim upon that fund. If indeed executions are issued, it might make a difference.

Next, it may fairly be considered that the fund which is withdrawn from the reach of the creditors by the decree, would have been appropriated equally to the maintenance of the wife, had no separation taken place, so that the creditors are not robbed of an advantage.

1 Cox. Ca.
445. 8 D. &
E. 521.

And lastly the cases of *Hobbs v. Hull*, and *Munn v. Wilmore*, establish that if a wife is entitled on account of the husband's behaviour to a divorce *mensa et thoro* in the spiritual court, and to have a proper allowance from him, and if instead of prosecuting her right, a separation is agreed upon, and a settlement upon fair and reasonable terms, made by the husband for her maintenance, that such settlement is valid against his creditors.

On Marriage
settlements,
381.

Mr. Atherly questions these cases; but upon the ground, that decree of the ecclesiastical court upon the divorce, would only have affected the person, and would have left the husband's estate for the creditors. But his answer to them wholly fails with us, as our court may enforce the decree for maintenance by sequestration of the personal estate, and of the rents of the real.

Statute, 2 R.
L. 199.

CAP. VIII.

REFERENCES ON A BILL FOR PARTITION.

THE Court of chancery assumed jurisdiction in partition on account of the difficulty attending the proceeding upon the writ at law, where the plaintiff must prove his title as he declares. By analogy to the jurisdiction in a case of dower, a partition is granted upon a bill.

Agar v. Fairfax, 17 Vesey, 552.

Lord Chancellor Thurlow said,—There was no original jurisdiction in partition, which is a proceeding at common law.

2 Vesey, Jr. 124.

In the case however of lands holden of the king in capite, and descended to coparceners, livery was not given by the crown without partition, the object of which was to increase the king's tenants in capite. The writ was returnable in chancery, was directed to an officer called an escheator, and executed without a jury.

Coke, Litt. n. 2. 169. a.

The jurisdiction in general cases was assumed under the act 32 Henry 8th making one joint tenant, &c. accountable to the other. This was held to make them trustees for each other, and so liable to convey under the jurisdiction of this court.

1 Vernon, 421. 2 Vesey, Jr. 124.

Previous to a decree, the court directs an enquiry by a Master to ascertain who are, together with the complainant, entitled to the whole subject.

17 Vesey, 552.

So under our statute for partition, it is provided "that in case of any sale or partition under that act, and before judgment therein given, the court shall examine and ascertain the rights, titles, and interests of the parties, plaintiffs, and defendants to such proceedings that the purchaser under such sale, may be protected in his title acquired thereby." This examination has been made in England in open court.

1 R. L. 513. 3 John. C. C.

"In partition the rule was granted to proceed to examine the title of the demandant, under statute 8 & 9 Wm. 3. Cap. 31. and on the day appointed, Walker opened his title. The several seisins, descents, devisees and conveyances were proved by affidavits. The deeds and wills were produced and read. Judgment by default given."

Hatton v. The Earl of Thanet, 2 Wm. Black. 1134.

I have understood that the learned gentlemen who penned our statute of partition has stated, that he had the preceding case before him, and that on a reference to ascertain title, it was necessary to go as far back into it as possible, because the object of the enquiry was, as expressed in the act, that the purchaser under the sale might be protected in his title.

Mr. Riggs.

nitable. On bills for a specific performance, this is well established.

Sugden, Law
of Vendors,
238, 9.

But Lord *Rosslyn* has said that where lands are sold under a decree of the court for satisfaction of debts, &c. that the purchaser may be compelled to accept an equitable title merely, viz. that which the decree gives him; because as the purchaser bought under the decree, he was bound to accept such a title as the court could make him. But he himself shows the gross injustice of this decision by another of his own decrees; viz. that the purchaser who has been compelled to take an equitable title, cannot enforce a subsequent sale to a third person, without giving him a legal one.

Laws of N.
Jersey, 499.

This decision which tends to render the property unmarketable shows that one or the other of the opinions is contrary to the principles of the court, and clearly unjust. In New Jersey, it is provided by statute, that where a decree is made for a conveyance, release, or acquittance, and the party shall not comply therewith by the time appointed, such decree shall be considered in all courts of law and equity, to have the same operation as if the conveyance had been executed.

CAP. IX.

SECTION 1.

REFERENCE ON A BILL FOR ADMINISTERING ASSETS.

Equity
Draftsman,
647. 652.
See a form
also in 4
John. C. C.
648.

THE usual form of a decree in a bill for the administration of assets is,—“ That it be referred to Mr. — one of the Masters, &c. to take an account of the said testator’s debts, funeral expenses and pecuniary legacies, and to compute interest on such of his debts as carry interest; as also to compute interest on his said legacies after the rate of per cent. per annum, from the time the same ought to have been paid, according to the said testator’s will, or from such time as is appointed for payment of the same by the testator’s will, and if no such time is appointed, then from the expiration of one year after the said testator’s death—and the said Master is to cause advertisements to be published in the *London Gazette*, and such other public papers, as he shall think proper, for the

testator's creditors and pecuniary legatees to come before him, and prove their respective debts, and claim their respective legacies, within a time to be therein limited, or in default thereof, they will be excluded the benefit of this decree."

And the said Master is also to take an account of the personal estate of the said testator come to the hands of the said executor, or to the hands of any other person or persons by his order, or for his use; and the said personal estate of the testator is to be applied in payment of his debts, funeral expenses, and legacies in a course of administration."

The usual directions for the production of books, and for the examination of the parties are also given.

"It is also generally part of the decree that such persons, not parties to the suit, who should come in before the said Master, to prove their debts, &c. are, before they shall be admitted to claim such debts or legacies, to contribute to the plaintiff their proportion of the expenses of the suit to be settled by the Master."

Mr. Turner observes this is very rarely attended to.

¹ Turner,
526.

The Master should begin with the advertisements for creditors and legatees to come in, and prove their demands.

In England the decree always directs an insertion in the *London Gazette*, and Mr. Turner says,—“It is now usually required that the advertisements should likewise be inserted in some of the public news papers, and in some of the country papers where the testator resided, a measure in which the public convenience is materially interested.”

¹ Turner,
167.

In *Thompson v. Browne*, the decree directed the Master, to cause reasonable notice to be given in his discretion, either personally, or inserted in such public paper or papers as he should deem proper, for the creditors to come in.

¹ John. C. C.
647.

The practice is for the Master first to advertise generally for the creditors and legatees to come in, without fixing any time. The period of such advertisements, and places of their publication are in the Master's discretion, according to the circumstances of the case. They may be going on during the taking of the account, and when that is drawing to a close, the peremptory advertisement should be inserted, which fixes a day by which the creditors must come in. Mr. Turner states that the peremptory advertisement may be had a month or six weeks after the first is published.

¹ Turner,
167. 181,
182. 2 Fowl.
Exch. Prac.
300, 301.

¹ Ibid. 182.

For form of the advertisements—See Appendix No. 57.

The Master will allow a creditor to proceed on a claim at any time before his report is settled, or indeed before it is signed, although the time limited has expired. After the re-

¹ Turner,
194. 7 Vesey,
587. 2
Fowler, 301.

1 Madd.
Rep. 529.
Angell v.
Haddon.

port is signed, an application to the court is necessary, which will be granted on payment of the costs of the fresh appointment, while the fund is in court.

The prosecuting party, creditor or other, proceeds against the defendants in the manner before fully detailed, under the general head of a reference to take an account.

The course by a single creditor, in respect to his separate claim is as follows :—

1 Turner,
524.

“ The creditor brings in a charge, stating the nature of his debt, the securities and the sum actually due,”— See form, Appendix, No. 19.

Ibid.

“ An affidavit must accompany the charge verifying the substance of it, and that the creditor has no security, or stating what ; and in most cases, an affidavit of the due execution of the bond or other instrument, is required from a subscribing witness.”

Fondale v.
Nash, 19
Vesey, 197.

In this case Lord Eldon said,—“ The affidavit of a creditor to his debt, before the Master is not to be attended to, if the debt is contested. It is only an assurance that the debt has not been paid, in cases where it may have been, and the claimant only knows it.”

1 Turner,
525.

Upon leaving the charge a warrant is taken out, and served upon the solicitors of the parties, underwritten to proceed upon the charge of A. B. a creditor.

1 Turner,
195, 196.

“ If the charge is disputed, witnesses may be examined, or it may be investigated either by a set of general interrogatories, for the examination of every creditor, or a particular set adapted to the case.” With us he may be orally examined.

The summons in the latter case should be underwritten. “ At which time the said A. B. is to be examined touching his charge.” The practice, in either course, is fully detailed before, under the general head of reference to state accounts.

Ante.

16 Vesey,
239. Paxton
v. Douglass,
1 Turner,
195, 196.

The Master settles the interrogatories.

It appears to have been doubted in one case, whether under the general authority in the decree, a Master could exhibit interrogatories to a creditor coming in.

Paynter v.
Houston,
3 Merivale,
297.

“ The plaintiffs filed a bill on behalf of themselves and all others, &c. The usual decree was made, for the Master to take an account of what was due to the plaintiffs, and all the other creditors, &c. The surviving partners of the testator brought in a charge for a debt due by him on a separate account as surviving partner of another house, and also on the balance of the partnership accounts.”

The Master suggested amendments in the charge which were made. He afterwards stated, that he did not think him-

self authorized to receive proof of the debt, as he considered the partnership formed an objection to the admission of such proof, that is that surviving partners could not prove a debt in a suit for the administering of the assets of a deceased partner.

The surviving partners now moved, that the Master might be directed to admit them to prove their claims under the decree to save the expense of other proceedings.

Mr. Bell against the motion said,—That under the decree, the Master could go into no accounts, but what were liquidated at the testator's death; and that he had not the power to exhibit interrogatories for the examination of the parties claiming before him.

Lord Eldon.—It is said that the Master is not in a situation to receive the claim for want of a power to exhibit interrogatories with respect to it. But it strikes me that never can be the case; that the court cannot place a creditor in such a situation as that his debt is not to be received. It appears to me the Master is bound to receive such a claim as this. Suppose there had been only a few items on each side to be established, can it be said the parties must be put to the expense of filing a bill in order to have such an account stated? I think I have seen reports in which the Master has stated, that he was not able to ascertain the validity of such claims, without a bill being filed for the purpose. If the Master finds, that he cannot go on without an examination of the parties upon interrogatories, and that it is necessary a commission should issue, the parties must apply to the court for the purpose.

An order was entered, referring it to the Master to take an account of the dealings between the testator in his own right, and as surviving partner of one firm, with the banking house in which the claimants were partners; and also the partnership dealings between the testator and the last house, and the parties were to be examined upon interrogatories, &c. with the usual directions.

The authorities on the other side are these:—

In *Turner's Practice* it is laid down,—“That the charge of 1 *Turner*
debt may be investigated before the Master, either by a gen- 195. 1 *New-*
eral set of interrogatories for the examination of each credi- land, 333.
tor, or by a particular set to meet the case of a particular
creditor. If a particular set of interrogatories were left,
doubts were formerly entertained whether they must be settled
by the Master in the usual way; or whether the claimant is
to be examined by the examiner upon interrogatories left for
that purpose. It seems now to be the generally received opin-
ion, that the interrogatories must be settled by the Master, as

is usually done in the examination of a party in the cause; a creditor by making his claim, and coming in under the decree being considered in relation to the cause, a party to it. And the practice seems so settled,"—Citing 16 Vesey, 239. This is the case of *Paxton v. Douglass*.

16 Ves. 239. "The plaintiffs filed their bill as creditors of Peter Douglass deceased, on behalf of themselves and all the other creditors, &c.—one *Christie* claimed before the Master, under the decree as a bond creditor; and interrogatories for his examination were allowed by the Master.—This case is also reported in *Turner's Practice*, 2d. Vol. 163. n. (a).

Eq. Draft.
552.

No order appears to have been obtained in that case. And in *Equity Draftsman*, which is a collection of precedents in actual cases, there is a form of interrogatories brought in for the examination of a creditor, the title of which is, "interrogatories exhibited on behalf of the said defendants, before *I. S. Esquire*, one of the Masters of this honorable court, to whom this cause stands referred, for the examination of *T. S.*, who claims to be a creditor of the testator *G. S.* in the pleadings of this cause named, pursuant to the decree, made in this cause, &c."

The usual decree runs,—“That the Master may examine all parties upon interrogatories as he shall direct.”

A creditor coming in may be fairly considered as a party within this provision.

3 Atk. 557.

In *Neve v. Weston*, Lord Hardwicke said,—“A man who comes in before a Master under a decree is quasi a party to the suit.” And in that case, a creditor after having gone in and proved his debt, filed a bill against the executor and heir.—They pleaded the other suit depending, and the plea was allowed. So a creditor coming in may apply to rehear the cause.

1 Sch. & Lef.
409.
Gifford v.
Hart.

The charge of the creditor being gone through, if the Master considers it made out, he marks it allowed.

1 Turner,
194.

A party dissatisfied with his decision, may either take exceptions to his general report when filed, or may obtain an order for him to make a separate report, and obtain the opinion of the court on that. Sometimes its direction may be procured upon motion or petition, without a report.

3 Merivale,
297.

In *Paynter v. Houslen* for instance, the Master having refused to proceed upon the claim of a creditor, a motion was made, supported by affidavit, that he should be directed to admit proof of the demand. The point was distinct and precise.

If a separate report is made, the usual warrants should be taken out to settle and sign it. If the creditor wait until the general report, he excepts as usual. 1 Turner; 300.

Where a charge has been allowed, the creditor's solicitor should attend at the Master's office, and examine the draft of the Master's report, to see that the charge is included in the schedules; but he must not take a copy of the report; his client being no party to the suit, he cannot be allowed for it in costs. 1 Turner; 526.

In an order of Lord Hardwicke it is directed, that any person shall be at liberty to take a copy of a report without the schedule, or of the schedule without the report. And in cases where distinct demands of several parties or creditors are comprised in one report, any person is to be at liberty to take a copy of so much of the report or schedule as relates to any distinct or separate demand. Beame's orders, 375. Novr. 1743.

It seems the general rule in England that the creditor proves his demand at his own expense, and the court in the case cited appeared averse to admit that a distinction should be made on account of the difficulty and expense of proving a particular debt. Abell b. Screech, 10 Vesey, 356. and the two cases cited.

There is a case in *Piere Williams* not cited in *Abel v. Screech*, in which it was resolved,—“That a legatee or creditor coming in before the Master, and not party to the cause, shall have his costs, for it was in his power to have brought a bill for his legacy or debt, which would have put the estate to further charge.” Maxwell b. Wattenhall; 2 P. Wms: 26.

In *Mason v. Codwise and others*, the subject was brought before the chancellor, and discussed by counsel. In his opinion he observes,—“That if the creditors come in under the general order in these cases, which is given in *Thomson v. Browne*, they are to be equally contributory to the costs of the suit, and ought to have their costs equally borne out of the fund. They stand upon the same title as to costs with the original plaintiff. June Term. 1822.

That it appeared to him if the creditor is admitted to prove his debt before the Master under the general rule, he comes in under the condition of contributing to the costs of the suit; and if he proves his debt, and creates on his part no unreasonable expense, he ought to have his costs borne by the fund; and when he comes in subsequently, and not upon the usual terms, he ought to bear his own expense unless it be very much enhanced by an unfounded opposition to it, and then the case may entitle him to relief.”

Jackson v.
Leaf, 1 Jac.
and Walk.
229.

From this case it appears that it is the rule to pay the costs of creditors pursuing at law up to notice of the decree out of the fund in gross, and not to bring them in as constituting part of the debt, upon which a rateable proportion only will sometimes be received.

The other proceedings under the decree now considered are to state the accounts of the executors, or other accounting parties; for which the practice and rules are before fully stated under the general head of reference to state an account.

The delays which may arise from the neglect of the creditor obtaining the decree, to prosecute it effectually, are corrected by leave being given to any other creditor to go on with the suit.

s Vesey,
520.

In *Paxton v. Douglas*, the Lord Chancellor said,—“There is no application to which I would sooner listen, than an application by any other person upon the least delay. The practice is, for a favorite creditor to file a bill and snap a decree; and one solicitor is concerned for all parties. But it is his duty to make the defendant set out what he has in his hands; for if he becomes insolvent, and an opportunity appears to have been lost, that solicitor would stand in great peril before this court.”

Powell v.
Walworth, 2
Mad. Rep.
183. 1817.

“This was a creditor’s bill against an administratrix. A decree was made in 1814 and J. O. a creditor was, on motion of the plaintiffs, restrained from proceeding at law. A motion was now made on his behalf, for leave to prosecute the suit, upon an affidavit that since the decree, no interrogatories had been filed to examine the defendant as to the monies in her hands, so as to have them paid into court.

Mr. *Temple contra*.—The interrogatories are prepared, and we will undertake they shall be filed immediately.

The *Vice Chancellor*.—The delay in filing the interrogatories is not accounted for. The motion is proper.”

Sims v.
Ridge, 3
Meriv. 458.

“The plaintiff a creditor had filed a bill against an administratrix.—The defendant delayed her appearance. About the same time, another bill was filed on behalf of one of the next of kin, claiming a share in the surplus, to which the defendant speedily put in an answer without oath, and without setting out an account. A decree was made by consent, and advertisements were had under it for creditors to come in. The present plaintiff Sims went in, and proved his claim which was allowed. He now moved on the ground of certain delays, that he might be at liberty to go before the Master, and

prosecute the cause, as if he were a party thereto ; and to examine the administratrix, and such other parties as he might be advised upon interrogatories ; and that the administratrix might be ordered to pay into court the amount of monies received by her on account of, &c. It was insisted that there was no delay, and that such an application had never been made where the suit was by the next of kin.

Lord Chancellor.—It is admitted that if the suit, which this is an application for leave to prosecute, had been a suit commenced by creditors on behalf of themselves and all other creditors of the intestate, the application would not have been very unusual. Undoubtedly the practice ought to be so, because one creditor may very well be the friend of the party or his representatives, and inclined unjustly to favor the estate ; and the court will go further for the purpose of prompting to diligence ; even to the extent of giving costs to the party making the application. Supposing there should be no authority at all to be produced in favor of this application by a creditor, where the suit has been instituted by the next of kin, I should yet have no hesitation in saying, that he ought to be allowed to prosecute the suit, if there is sufficient proof of the want of reasonable diligence.”

SECTION 2.

The jurisdiction of the court of chancery in the distribution of assets is of great importance.

Until of late the subject has not been brought fully before our court.

In *M'Kay v. Green*, and *Depan v. Moses*, the Chancellor ^{3 J. C. R.} expressed his doubts, whether a creditor could come into this court, without some special circumstances for recovery of his demand, and stated that he was not prepared to assume an exclusive jurisdiction of suits against executors, merely to enforce a rateable distribution of assets. ^{56. Ibid, 349.}

In the subsequent case of *Thompson v. Browne*, he entered ^{4 J. C. R.} at large into the subject, examined a great number of authorities, and declared certain principles, as the result of his investigation, of the most important character. ^{619.}

The two material positions of the chancellor are :—

1st. That if a bill is filed by a creditor, *either singly for himself, or specially* on behalf of himself, and all other creditors, and a decree for an *account* is obtained, the decree is for the benefit of all the creditors, and in nature of a judgment for all. All may come in and prove their demands ; and from

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the date of such decree the court will enjoin creditors from proceeding at law, and will take the sole distribution of the assets.

2d. That in such case, the assets are distributed, first by paying all judgments prior to the decree, according to their priority in time, and all other debts rateably without regard to legal priorities, and without regard to the nature of the assets, whether legal or equitable.

1. The first position is unquestionable where the bill is filed by a creditor on behalf of himself and all others.

But where the bill is by a single creditor, or class of creditors, for his or their separate demands, it at least is doubtful.

The right of a creditor to file a bill for his separate satisfaction is founded on numerous cases.

Cases Temp.
Talbot, 217.
3 Atk. 283.

Lord Talbot states, that the ancient course was to bring the bill for a discovery merely to assist an action at law, but now for discovery and satisfaction of the debt. And Lord Hardwicke expresses himself to the same effect. The following cases are instances of such bills, in which all that is sought is an admission of assets, or an account if not admitted; and the establishment and satisfaction of a particular debt. *Alexander v. Alexander*, 1 Rep. in Ch. 37. *Robinson v. King*, Dickens, 297. *Waller v. Goring*, Ibid. 299. *Machin v. Graves*, cited Dickens, 707. *Joseph v. Mott*, Prec. in Chan. 79. All the bills in *Morrice v. The Bank of England*. Cases Temp. Talbot, 217. *Smith v. Eyles*, 2 Atk. 384. *Attorney General v. Cornthwaite*, 2 Coxes cases, 44.

The earliest case is one of the clearest.

Alexander v. Alexander,
1 Rep. Ch.
37.

"Bill to discover assets and satisfy a debt due to the plaintiff.—It was insisted the plaintiff ought not to have remedy here, nothing appearing, but that she had a proper remedy at law. But an account was decreed."

I think that an examination of these cases will show, that it has long been and is yet the doctrine of the court, that a bill of this description is like an action at law by a creditor for his own benefit, and on his sole account, under which the other creditors have no right to come in; that on such a bill, the decree *quod computet*, amounts to no more than an interlocutory judgment at law, and gives no preference; that the decree must be final for the recovery of a liquidated sum, before it becomes equivalent to a judgment; and therefore, that until such a decree, the court will not interfere with another creditor, proceeding at law.

In none of the cases above cited is there a trace of the decree being in any way for the benefit of the other creditors.

In *Martin v. Martin*, Lord Hardwicke said,—“ If several ^{1 Vesey, Sen. 212.} creditors proceed in this court for satisfaction by different bills, the court will not stop the suit of one, because of the priority which may be gained ; although this creates an entanglement upon the estate.” He mentions a case in which there were five distinct bills against an executor, which Lord King refused to hear together, because he would not deprive a creditor of the right to get a priority in his decree if he could.

If the decree for an account on one bill would have been a decree for all the creditors, no priority could have been obtained.

4 B. P. C.
465.

In *Morrice v. The Bank of England*, the two decrees obtained were by a few creditors in each bill, for their separate demands, and the decrees were final ; in one case, upon an admission of just debts by the answer, and in the other upon a report and final decree for payment ; and these decrees took preference over subsequent judgments.

In *Smith v. Byles*, the rule upon a single creditor's bill is clearly stated. “ The plaintiff was a creditor, either by simple contract or specialty, (it does not distinctly appear which,) and having filed a bill, obtained a decree for an account. Before the report, the executors confessed a judgment. The Master reported this judgment to be of a prior nature to the plaintiff's demand. An exception was taken. ^{2 Atk. 384. 1742. See also Shirley v. Ferrers, cited 10 Vesey, 34.}

Lord Hardwicke said,—It is allowed that if a decree is obtained against a testator, or his executor, *quod computet*, it can by no means be put upon an equality with a judgment confessed after such decree. These decrees have been truly compared to interlocutory judgments.

In equity upon a decree *quod computet*, it does not pass in *rem judicatam*, till the final decree. Exception overruled.”

“ The decree in such a case does no more than direct an account of what is due to the plaintiff, not a general account of debts ; that the executors pay such demand out of the assets in course of *administration* ; and in case they do not admit assets, an account of the personal estate.” ^{Per Dicken's Register, Bedford v. Leigh, Dickens, 707.}

Mr. Dickens stated, that a decree upon a bill by a single creditor, not on behalf of himself and the others, never goes to real assets ; in which position Mr. Ambler and Mr. Madock concurred ; and in the principal case, Lord Thurlow dismissed the bill so far as it prayed satisfaction out of the real estate descended. ^{See the reason of this rule explained, Post.}

“ In an *anonymous* case, Lord Hardwicke declared, that ^{3 Atk. 571.} where a bond creditor brings a bill against an executor for an account of assets, and satisfaction, it is no objection for want of parties to say, he has not brought other bond creditors, or

creditors of a superior nature before the court, for any one bond creditor may bring his bill, as the court decrees only an account; and directs the executor to pay in a course of administration; and then the executor before the Master may set forth, as he is conversant of the state and condition of his testator, what debts are prior to the plaintiff's which he is obliged to pay, as having a legal preference."

2 Cox's cases,
44.

So in the case of the *Attorney General v. Cornthwaite*.

"An information at the relation of certain trustees of a charity, against the executors of a late treasurer, for payment of balances due from him.

By the decree a reference was ordered to take an account of the monies come to the testator's hands; and what should be due on that account was to be paid in a course of administration; and if assets were not admitted, an account was to be taken of the personal estate of the testator. On the report coming in, the Lord Chancellor expressed a doubt, whether the report of the amount of a particular debt, and of the personal estate was a sufficient ground for a personal decree for the payment of the debt, without a general account of the testator's debts.

But it was said, and agreed on both sides at the bar, that where a single creditor brings a bill, there is no general account of debts directed, but the course is to direct an account of the personal estate, and of that particular debt; which is ordered to be paid in a course of administration. And all debts of a higher or equal nature may be paid by the executor, and must be allowed him in discharge.

The Lord Chancellor however directed the Master to state, whether the balance found due would, by reason of any specialty or other debts, be the balance coming from the executors, to be applied in a *course of administration*."

The object of this direction was merely to have the amount and priority of all superior debts stated, upon the report; so that the decree might be for the actual sum, which by a course of administration, the executors would hold applicable to that demand. I consider it as recognizing entirely the principle stated by the counsel on both sides, and only to provide for the statement of *unpaid* superior debts in discharge, as well as those which had been paid.

10 Vesey, 34. Another important and late case upon this subject is *Perry v. Philips*.—"The plaintiffs claimed under a general devise and bequest.

By the decree an account of the personal estate was directed.

Exceptions were taken to the report, disallowing certain payments made by the executrix, which appear to have been of judgment debts.

Lord Chancellor held that a mere decree for an account of the demand of the plaintiff, and of the personal estate come to the hands of the defendants, with a mere direction for payment out of the result of that account, was not a decree to prevent the executors paying a judgment. There must be a report, and a final decree upon it. Upon these grounds therefore, these judgments were well paid as against the original decree. The exceptions were allowed."

The judgments must have been after the decree, or there could have been no question.

The Chancellor in *Thompson v. Browne*, appears to have^{1 Vesey, 213.} come to his conclusion upon this point, upon the authority of the cases of *Martin v. Martin*, *Douglass v. Clay*, and *Brooks v. Reynolds*.

In the former Lord Hardwicke states, and it is cited by the Chancellor, that the constant course of the Court was, on a *decree for sale* in satisfaction of a *Bond* creditor, not only where it is on behalf of himself and others, but *even where the bill is for satisfaction of his own particular debt*, to direct an account of all the bond debts of the testator, with liberty to come for a satisfaction, without which no decree for a sale could be. He then states the mischiefs and inconveniences, if this was not done, as another bond creditor proceeding at law, might issue a *Levari*, and the effect of a sale under a decree of the court, could not be had. But Lord Hardwicke clearly recognizes the creditor's right to proceed against the *executor and the personal estate* for a separate satisfaction, because in a previous part of the case he states, "that if several creditors proceed in this court for satisfaction by different bills, the court will not stop the suit of one, because of the *priority which may be gained*, although this creates an entanglement and difficulty upon the estate."

And the case of *Bedford v. Leigh*, before cited, corresponds with Lord Hardwicke's doctrine. The single creditor, on^{Dickens, 707.} his separate bill, can only be relieved out of the personal assets; he cannot procure a decree against *real* assets for his sole benefit. And Lord Hardwicke's decision in the anonymous case, 3 Atkins, 571. clearly shows that this is the distinction.

The case of *Douglass v. Clay*, which the chancellor cites as^{Dickens, 393.} establishing the same rule in the case of *personal* assets, as Lord Hardwicke declares as to *real*, was a case expressly of

creditors filing a bill on behalf of themselves and others. It is reported in Dickens.

"The defendant Clay and other creditors filed the bill against the present plaintiff, an executor, on behalf, &c. The usual decree was made for an account. Then the defendant Clay, neglecting to go in before the Master, commenced an action at law, and the bill was filed for an injunction, which Lord Camden granted.

1 Br. G. C.
183.

"*Brooks v. Reynolds*, was the case of a devise to trustees of freehold and personal estates upon certain trusts, after payment of the testator's debts.

The trustees filed their bill for directions and indemnity, and a decree was made for an account of the personal estate; debts, &c. the personal estate to be applied in a course of administration, and if a deficiency, the creditors might apply to the court.

A bond creditor having sued at law, this bill was filed to enjoin him. It was contended that there was no instance of this except upon a creditor's bill. But Lord Thurlow held the principle to be, that the creditors *here could come in* before the Master, (an account of debts was directed) and that the court had taken the whole fund into its own hands to distribute."

4 Vesey, 638.

Rush v. Higgs, was a case of the same character, and the injunction was refused, because there was no decree. The Chancellor asked, if there was any instance of a creditor being stopped at law, unless there was a decree under which he might come in?

The rule therefore is, that in these bills, whether by creditors on behalf of all, or by trustees and executors for directions, the court being called upon to take the whole distribution of the assets, and able to do it, the creditors will be stopped from proceeding at law, after a decree for an account. But in a bill by a single creditor, the court is not called upon to distribute the fund, but only to give him a decree for his separate demand, payable in the course of administration.

The numerous cases on this branch of jurisdiction may be divided into two classes according to the nature of the bill, whether a single or a general bill, and each class examined with a view to two points. *First*, as to the authority of the executor to grant preferences; and *Second*, as to the interference of the court in restraining a creditor from proceeding adversely at law.

2 Ch. Cases,
200.

And first upon a bill by a single creditor for himself alone. In *Parker v. Der*, 1674, it was held by the Master of the

Rolls, that neither *voluntary payments*, nor *judgments confessed*, of debts of an equal degree with the complainants, were to be allowed an executor *after bill filed*. And the same was the doctrine in *Surrey v. Smally*, 1687. But in *Bright v. Woodward*, 1685, *Scarle v. Lane*, 1688, and *Goodfellow v. Burchett*, 1693, the distinction, as at law, is taken; viz. that the bill prevents the alienation of assets by payment of debts of equal degree without suit; but that judgment may be confessed upon such debts, and a preference thus obtained.

Then came *Darston v. The Earl of Orford*, 1701, in the House of Lords, and *Mason v. Williams*, destroying this distinction, and allowing a voluntary payment as well as a confessed judgment to the executor, whether before or after the decree *quod computet*.

The case of *Waring v. Dancers*, 1715, does not touch the question as to the payment without confession. It decides only that the judgment confessed it to have a preference.

In *Robinson v. Tonge*, 1735, there is no decision. It is stated by the reporter in a memorandum, that it was insisted, that the administrator could not pay a bond, after a bill filed by another bond creditor, without giving judgment, which the court seemed without difficulty to allow. Whether this is sufficient to restore the former rule, against the decision of the House of Lords in *Darston v. Orford* is a question of at least some doubt. Mr. Raithby, editor of Vernon's Reports, treats it as doing so.

Smith v. Eyles, was a judgment confessed after a decree for account, and allowed. *Shirley v. Ferrers*, cited in *Perry v. Phelps*, was a judgment subsequent also to such a decree, whether confessed or not, does not appear; and the latter case must have been one of the same circumstances, because the argument there was, that the decree was equal to a judgment; that it was final or sufficiently so.

2d. The interference of the court to restrain a creditor proceeding at law depends upon the same rules as the allowance or rejection of preferences by the executor. Of course, the court will never interpose in this manner before that stage of the suit, in which it will disallow a preference, because it will regard more favorably an adverse proceeding against an executor, than his voluntary payments. Therefore upon such a bill, an injunction will not be granted until there is a *final decree* for the demand.

Morrice v. The Bank of England, was a case of an injunction granted at that period of the cause: and see the statement of the Lord Chancellor in *Perry v. Phelps*.

1 Vernon, 457.

1 Vernon, 369.

2 Vernon, 88. Ibid. 298.

Prec. in Chan. 188. and 3 P.

Wms. 401. n. (t.) Salkeld, 507.

1 P. Wms. 295.

3 P. Wms. 401.

2 Atk. 394. 10 Vesey, 34.

10 Vesey, 34.

Next, where the bill is by creditors on behalf of themselves and all others.

The earliest trace of these bills in the history of the court, may perhaps be found in a description of bills anciently called *Bills of Conformity*.

Page 86.

In the *Practical Register* it is said, "that these bills by creditors agreeing to remit part of their debts, to do the like, were sometimes heretofore used, but are now vanished, having for the inconvenience they occasioned, been prohibited by proclamation."

1 Vernon,
152. 1683.

In *Alderman Backwell's* case, the Lord Keeper North said,—"That bills of conformity had been long since exploded, and there was no such equity now in this court."

Cases Temp.
Talbot, 224.
1736.

Lord Talbot in *Morrice v. The Bank of England*, said,— "That as to bills of conformity, the case of *Buckle v. Attleo*, 2 Vernon, 37. was a case where they had been allowed, but they had been since discountenanced; and the reason is, because this court is satisfied that they have no right to take away the preference that one creditor gains over another by his legal diligence. Besides that such bills may be made use of by executors to keep people out of their money longer than they would otherwise be."

2 Vernon, 37.
1688.

The case of *Buckle v. Attleo*, certainly was not a bill of conformity, in the meaning given by the passage from the *Practical Register*. The bill was by an executor against all the creditors that they might contest each others debts, and dispute *who ought to be preferred in payment*. The court on demurrer, held it a proper bill, and a safe way for an executor to take.

Besides it would be singular that a bill of conformity should be entertained by the court in 1688, the time of *Buckle v. Attleo*, when Lord North in 1683 had declared that they were exploded, and there was no such equity now in the court.

I have resorted to every source of information within my power, to explain the certain meaning of the bills of conformity but without success. I think however, that it may be safely deduced, that previous to the time of Lord Talbot, there were some floating notions respecting the power of the court to take the whole distribution of the funds, and prevent an alteration of the situation of creditors or a preference being gained by any.

4 Vesey, 642.

Lord Rosslyn in *Rush v. Higgs*, treats the case of *Buckle v. Attleo*, as a very singular one, and asks how all the creditors are to be made parties? no doubt such a course is expensive

and dilatory, and would be severely discouraged by the court, even in a case where *it was* practicable. But I apprehend the principle is precisely the same as upon the bills by one creditor for himself and all others.—The decree for an account, brings in all the creditors, and Lord Hardwicke treats them *quasi* ^{3 Atk. 557.} parties to the suit.

The ~~principle~~ of the earliest cases upon this subject, appears to have been, that the creditor, against whose proceedings at law the interference of the court was sought, had become an actual voluntary party to the proceedings in equity, either by joining in the bill, or coming in under the decree.

“ Thus in *Shepherd v. Kent*, the creditors having joined in a bill, and obtained a decree for the payment of their debts, some of them to gain a preference had obtained judgments. And upon a bill by the other creditors to be relieved, the Lord Keeper declared that since all had joined and obtained a decree for payment, no preference could be gained.” ^{2 Vernon, 435. 1702.}

“ So in *Farnham v. Burroughs*, there being a decree for an account of debts, and for creditors to come in, &c. a bond creditor came in, and obtained a commission to prove his debt, and afterwards sued the heir at law on his bond. The heir filed the bill for an injunction. Lord Hardwicke granted it, saying, the defendant had made his election to proceed in this court, by coming in under the decree.” ^{Dickens, 63. 1753.}

In the case of bond creditors suing the heir at law on behalf of themselves and others, Lord Hardwicke had a short time previous, in *Martin v. Martin*, granted an injunction in favour of the heir against actions at law, after a decree to account, and for a *sale of the real assets* descended. This was put upon the ground of a sale being directed, and the embarrassments arising from permitting creditors to take execution at law against the property. ^{1 Vesey, 213. 1748.}

The case of *Douglass v. Clay*, seems to have first declared the doctrine as against executors, which is now adopted by the court.

From the report in Dickens it appears that there was a bill originally filed by the present defendants on behalf of themselves, and the rest of the creditors, for an account and satisfaction, under which the usual decree for an account was made. ^{Dickens' Rep. 393. 1767.}

The plaintiffs in that bill, the present defendants, omitted to go before the Master, but commenced actions at law: upon which the executor, the present plaintiff filed the bill for an injunction. The defendants insisted by answer, that their names had been used without their consent in the first bill.

Lord Camden, granted the injunction. There is no statement of his reasons, but in *Perry v. Philips*,—Lord Eldon states, that in *Douglas v. Clay*, Lord Camden said,—That until decree any creditor may proceed at law, but after decree, this court considered it as much available to any creditor, and to all who came in, as if all had obtained judgment.

Then came *Brooks v. Reynolds*, where Lord Thurlow held there was no distinction, whether the bill was by trustees or by creditors; a decree having been made under which creditors might go in before the Master, and the court having taken the fund into its own hands.

And then the case of *Kenyon v. Worthington*, recognized and confirmed the doctrine; expressly holding, that the decree in these cases need not be final.

The several other cases cited by the Chancellor in *Thompson v. Browne*, followed, and settled the principle immovably; with the important addition of allowing the injunction upon motion in the original cause, instead of requiring a new bill. This practice arose in the case of *Cleverly v. Cleverly*, before Lord Rosslyn.

2d. Upon the point of allowing voluntary payments and preferences on bills of this description, there is one question, which appears to me still open: whether after bill filed, and before the decree, for an account, the executor may pay voluntarily, or give a preference by confessing a judgment to a creditor of equal degree.

It is manifest that such preferences and payments will be disallowed after the cause is at that point at which the court will restrain an adverse proceeding; that is after a decree for an account. And the case of *Jones v. Jukes*, is an authority to this, though none would be necessary. But whether merely filing the bill is not sufficient to prevent these preferences, is a question upon which the court has not passed.

I conceive that it is untouched by the cases of *Darston v. Earl Orford*, *Mason v. Williams*, *Goodfellow v. Burchett*, and the others of that description, whether cases of voluntary payments without suit, or of judgments confessed; because all those cases were upon bills by a single creditor for his separate demand. The rule of those cases affords an argument from analogy but is not binding.

The leading cases do not decide this point. They result in this, that a creditor shall not be enjoined from proceeding adversely at law before the decree for an account. Until then the court will not interfere with the right of obtaining a preference by superior diligence.

So stated by
Mr. Bell,
Am. J. in
Paxton v.
Douglas,
8 Vesey, 520.

2 Vesey, Jr.
518.

1 Br. C. C.
183. 1782.

10 Vesey, 34.

Dickens, 688.
& 1 Vesey,
40. 1786.

In none of them has it been determined, that a confessed judgment should have a preference, or a voluntary payment be allowed, after a bill of this general nature is filed.

There is certainly a broad distinction between the cases.

In the one of an adverse judgment before decree, the vigilance of the creditor is rewarded. No right of preference is given to the executor. Any other creditor could have obtained the same advantage.

The aim of the court in encouraging these bills is, to prevent the great power of executors of giving preferences to particular creditors. But that power would remain in almost equal force, if the confession or payment is permitted. Even the former upon which a judgment may be entered in vacation would be sufficient to enable a partial or corrupt executor to defeat the court. In bills of this description the court is called upon to take the whole administration of the assets into its own hands. If the case of *Surrey v. Smalley*, was on a bill of this general nature, it would be decisive, because it would not be contradicted by the subsequent cases, such as *Darston v. The Lord of Orford*. It does not appear from the report, whether it was such or not. But in either case, the vigorous understanding of Chancellor Jefferies plainly took this as the principle, that a bill filed in this court checked all power of preference in an executor, and left the creditors to a fair competition of diligence in adverse suits. (1.)

¹ Vernon,
457.

It must be observed that the court would be much more inclined to disallow preferences upon a bill for the benefit of all the creditors, than upon one for a separate satisfaction.

The second position in *Thompson v. Browne* before adverted to was, that under bills for distributing assets they are distributed first in paying judgments according to their date, and next all other debts, rateably, without regard to legal priorities, or the nature of the assets.

It is obvious that this position, if correct, is one of the most important doctrines of the court, and calculated greatly to enlarge its business.

We must recollect as a preliminary principle, that the priority of debts according to their nature, is a common law rule, and that express statute regulations have been required to alter it in specific cases, such as in bankruptcies, insolvencies,

(1) Speaking of Lord Jefferies, *North* says,—“Where he was in Life of the
temper, and matters of indifference came before him, he became his Lord Keeper
seat better than any man I ever saw in it.” Guilford.

distribution of the produce of a sale of real estate under an order of the surrogate, and other instances.

It is also unquestionable that the court of chancery at a former period followed the law in the distribution of *legal assets*; we must see clearly therefore that the rule is altered.

2 Vernon, 61.
1688.

In *Lawley v. Gower*, the court say,—“Where creditors are plaintiffs, the usual decree is, that the debts shall be paid in a course of *Administration*; but that is to be intended of *legal assets*, and not assets in equity, that are not assets in law.”

3 P. Wms.
341. 1734.

The point decided in the case of *Sir Charles Cox's creditors*, was, that an equity of redemption was *equitable assets*, and so distributable equally. The Master of the Rolls proceeds to state his opinion that a bond creditor, coming in under a decree on a simple contract creditor's bill for himself and others, submitted to the decree, and should take equally.—And secondly that if a bond creditor had notice of the decree and advertisement, and then sue at law, an equity would arise to compel him to come in, and accept a proportion ratably with the simple contract creditors. His Honor stated however, this was no part of his judgment, and as the Chancellor observes from the note of Mr. Cox, the decree directed the Master to distinguish between the legal and equitable assets; and that such as were legal should be applied in a course of administration, and such as were equitable should be applied *pari passu*.

Note 2.
Page 344.

And Mr. Cox in a note says,—“As to the third and fourth points,” (the above positions) “it has since been settled otherwise. See *Morrice v. The Bank of England*.”

Cases Temp.
Talbot, 220.

“In that case Lord Talbot very clearly and repeatedly declares the rule, that equity cannot take away the legal preference on legal assets. That the court had only a concurrent jurisdiction upon legal assets with courts of law; and as such preference is allowed by law, there would be great confusion in the administration of legal assets, if this court did not in general follow the same rule; and upon that reason, courts of equity have departed from that rule, which they had set to themselves, and borrowed from principles of natural justice. All the assets there were legal, and Lord Talbot said, the decree must be that the effects be applied first in discharge of the decree creditors; next of the judgment creditors according to their priority, and so on in a course of administration.” It may be remarked, that the court distributes equitable assets equally upon the principle, that he who comes for equity must do equity.

Page 2.

The court is applied to, for its aid in subjecting to the debts a fund which cannot be reached at law, and the terms of its interference are an impartial distribution.

The decrees of the court still declare, "that the personal estate should be applied in payment of debts and funeral expenses in a course of administration."

Equ. Draft.
647. Ibid.
652.
Newland's
prac. 2d. 329.
Ibid. 332.

In Newland's Practice are the minutes of a decree entitled, "minutes of a decree on creditors bill for payment of debts *pari passu*," in which after the same direction for the application of the personal estate, in a course of administration, the real estate is declared to be charged with the debts by the will, and therefore directed to be sold for payment of all debts unsatisfied out of the personal estate." The charge made equitable assets.

I apprehend there is nothing tending to establish the rule as to legal assets, except the language of the equity judges in speaking of decrees of account, from which it is considered as inferrible. There is not to be found an express decision or an explicit statement of such a rule.

This language is of this character.—That a decree for an account upon a creditor's general bill is in the nature of a judgment for all the creditors.—That it is a judgment in favor of all the creditors.—That the object of such a suit is to give a judgment to all the creditors, and to secure a distribution of the assets without preference to any.—That the creditors of a deceased insolvent may always be compelled through the medium of a court of equity to take an equal distribution of assets.

8 Vesey, 520.
1 Sch. &
Lefroy, 296.
18 Vesey,
469.
1 Camp. N.
P. 543.

It may be observed that the phrase, a judgment in favour of all the creditors, and phrases similar to it, have been used in reference to the point of an equality of a decree for an account to a judgment at law. On such a bill it is equal to a judgment, to prevent any advantage by a subsequent judgment at law, and therefore to stop proceedings at law. It may then be said, that these phrases do not necessarily imply, that all debts of every degree are converted by the decree into judgment debts of the same date, to be paid proportionately.

In opposition to this idea, the language of Lord Thurlow in *Gpate v. Fryer*, appears very strong. He says,—“That the decree for an account gives every creditor who goes in, a claim equal to that of a creditor by judgment at law, from the date of the decree.”

3 Cox. 201.

It may be remarked however that there is reason to suppose, the creditors in that case were all by simple contract.

If so understood, the position is not inconsistent with my construction.

As to the phrases, *securing a distribution without preference, and compelling the creditors to take an equal distribution of assets, or a rateable distribution*; it may be suggested, that a distribution may be termed *rateable* or *equal*, when the division is proportionably among all creditors of an equal degree, as well as when it is equally among all debts; and the preference then spoken of as prevented, is the preference which an executor can give to one debt of equal degree over another.

It is this power in the executor which Lord Eldon refers to, as the reason of the court of chancery interfering.

4 Br. Ch.
Rep. 167.

The case of *Lowthian v. Hassell*, appears to be of weight upon this point. "On a bill by creditors, the usual decree was made; and on further directions, the Master was ordered to state what sum was produced by personal estate, what by equitable assets, and what by legal assets; and also what were the specialty and simple contract debts. When the report came in, it was declared, that it appearing that the funds directed to be carried to the account of legal assets would not be sufficient to pay the specialty debts remaining unsatisfied, the specialty debts were to abate in proportion, and the Master was to settle in what proportion.

One of the specialty creditors, by five bonds, had been paid the amount of one of them before bill filed; and the Master made the abatement upon the whole five, allowing him the amount of the dividends upon the five, less ~~the~~ the sum received upon the one. An exception was taken, that the Master ought not to have made any deduction in respect to the sums paid, but that the defendant ought to have been suffered to come in upon the legal assets *pari passu*, with the other specialty creditors, for the whole of what remained due to him by specialty. Lord Commissioner Wilson said,—“In administering legal assets the court follows the law; but where there is a deficiency, it administers them *pari passu*.” And so Lord Commissioner Eyre,—“The court proceeds on equitable assets by the rule of equality, but on legal assets it goes only a certain way; and until a deficiency appears, it must administer them according to the rule of law.”

I understand by this merely, that when a deficiency appears the court abates the debts of an equal degree in proportion; a course unknown at law. The exception and facts of the case show clearly that the court speak of a payment *pari passu*, and *abating in proportion*, in reference to debts of equal degree.

There is another consideration which perhaps is of weight. The effect which the rule supposed naturally should have had upon the doctrine of marshalling assets.

The chancellor does not understand the rule in England to be confined to an equal distribution among all debts of that fund (the personal assets) which is legally liable to all debts; but he considers it as extending to all assets real as well as personal. I conclude this from the generality of his language, and the distinction not being noticed.

It is true that marshalling assets in favor of *Creditors* cannot exist with us, since a statute has subjected real estate to simple contract debts; but we are considering whether the rule supposed, exists in England.

The substitution of a simple contract creditor in the place of one by specialty who has been paid from the personal estate, or the compelling the latter to resort for satisfaction to that fund on which the other has no claim, is a provision of the English court to remedy, without violating, the rule of law. The real assets are liable, solely by virtue of the specialty creditor's lien, and therefore liable to the amount of his demand only. If the specialty and simple contract creditors' demand are of equal amount, and the former is fully paid from the personal, the latter will be so from the real assets. But here is the limit of the relief given by marshalling. If the simple contract debt is greater, the excess cannot be paid out of the real estate. Now the proposition is, that in a case of general insolvency, that is, where all the assets of every description, are insufficient to pay *all the debts*, there shall be an equal distribution without any preferences, except as to judgments obtained before the decree. If so, why should not the court also say, that where there is a partial insolvency as respects a class of creditors, by the insufficiency of that fund on which alone they have a legal claim, that they shall be allowed to go upon the other fund with an equal claim. Why does not the principle of the former rule involve this conclusion? The court would do no more in one case than in another. It would admit in both the simple contract creditors to participate in that property, upon which they had no legal claim. It is supposed to do this in a case where specialty creditors must be losers; and why not do it in a case where they *may* be fully satisfied, that is where the real assets would cover the balance of all the debts? If this conclusion is correct, the doctrine of marshalling assets would have been superseded by one far more efficient, and would no longer appear among the rules of the court. The court would say distinctly that the personal assets, and a suffi-

ciency of the real, should be applied for the payment of all the debts.

If that doctrine does still appear, and is acted upon, there either is a falsity in the reasoning deducing its inconsistency with the alleged rule, or that rule does not exist.

7 Vesey, 207.
12 Ibid. 416.

That marshalling still prevails is very clear. I need but refer to the cases of *Powell v. Robbins*, in 1802, and *Gibbs v. Angier*, in 1806.

1 Sch. and
Lefroy, 296.

If the language of Lord Redesdale in *Largin v. Bowen* is nicely examined, it will appear either very loose which is difficult to suppose, or inconsistent with the doctrine supposed. He says that "from the moment of the decree to account, the court proceeds upon the ground, that the decree is a judgment in favor of all the creditors, and that all ought to be paid according to their priorities as they then stand."

Would Lord Redesdale have thus expressed himself, if he had intended to say, 'that anterior judgments are to be paid according to their date, and all other debts equally, whatever may be the nature of the assets?' It seems surprising to me, that a doctrine of so much importance and so plainly an innovation upon a principle which is admitted to have been the settled rule of the court as late as the time of Lord Talbot, should no where be distinctly and positively expressed; that the strongest arguments to support this assumed doctrine, arise from expressions of equity judges, susceptible, certainly without any harsh bending of the language, of a different meaning, viz. that the equal distribution, ~~the~~ the rateable distribution of legal assets means equality amongst debts of equal degree; checking all the common law power of preference by the executor, and all adverse proceedings at law to gain a superiority, by the creditor.

In the decree in *Thompson v. Browne*, it is directed that the personal estate be applied, in the first place to satisfy judgments, according to their respective priorities in point of time.

Cases Temp.
Talbot, 223.

This appears to be sanctioned by the leading case, *Morrice v. The Bank of England*, in which Lord Talbot said,—“That decrees and judgments stood upon an equal footing, and that such as is first obtained against an executor ought to be first paid out of the assets;” and the decrees and judgments were paid according to their priority in time.

It is somewhat singular, that a preference should be given in equity to priority in time against personal assets, which does not exist at law. The executor may at law pay which judgment he will without regard to its date. It is not materi-

al which judgment is precedent in time. But he who first sues execution must be preferred.—And before execution sued by either it is at the executor's election to pay which he will first.

Office of Executors, 136, 137.

Mr. Toller also states, that a *scire facias* sued out gives a preference; but if two creditors sue out a *scire facias* each, the executor may confess to which he chooses.

Law of Executors, 207.

The reason is that personal property is not bound until the writ is lodged with the sheriff. Why does not the court follow out its principles in this instance, and apportion *personal assets*, rateably among judgments? It deviates as Lord Talbot says, from its ordinary rule of justice and equality, in allowing preferences against legal assets, in order to follow the law; and yet in this instance it deviates from the law, to establish inequality.

The case of *Morrice v. The Bank of England*, may not, on an accurate examination prove as strong upon this point, as it at first appears. Perhaps the assets applied in the manner decreed were real assets, the produce of real estate. In the executrix's plea in 1731, she plead bonds and specialties to £15,000; and that she had only £1000, assets to pay; and in 1734 the real estate was declared subject to the debts, and directed to be sold. Now against the real estate, and justly against its produce on a sale, judgments would be preferred by their dates.

See the report in 2 Br. P. C. 465.

In *Goate v. Fryer*, however Lord Thurlow says,—“The court does not take from a creditor the benefit of a judgment if prior to a decree, but it only supports the decree as equal in point of rank to a judgment; and then follows the rule of law in giving preference to the prior debt in point of time.” But the rule of law does not give that preference as to personal assets.

2 Coxes cases, 201.

CAP. X.

SECTION 1.

REFERENCE TO COMPUTE AMOUNT ON A BOND AND MORTGAGE.

THIS is the most frequent species of reference with
The practice is rarely strict and it has become so well

us.

established by a uniform course, that the solicitor may rely safely upon it, although deviating from that in other cases.

2 Merrivale,
1.

Lord Eldon has said, "that ancient and uniform practice constitutes the law of the court as much as a positive order."

The case is sometimes out of the ordinary course, and attended with circumstances which induce the solicitor to pursue as strict a practice as in general cases of account. This is done from greater caution, but is not necessary. If the peculiar circumstances of a case were to determine whether it was requisite or not, there would be an end of all certainty and precision of practice.

On leaving the order, a summons is taken out, wherever a party has appeared, which may be underwritten, "to attend upon the computation of the amount directed by the above mentioned order."

It was before observed, that the summons must be served, although the bill is taken *pro confesso* for want of answer after appearance.

And such is the rule in Ireland. "Where a bill is taken *pro confesso*, and an account directed to be taken, the defendant's attorney is to be served with summonses, to attend the officer thereon, as if the defendant had appeared on the hearing."

2 Howard's
Eq. Side.
489.

On the day of the return of this summons, the report may be drawn up, and dated. The parties should on this attendance, see to the accuracy of the computation, and the allowance of all credits. It is proper to do this at that time, as no draft of the report issues, nor is any other summons taken out.

This rule is founded on general practice, and certainly is proper, because in nearly all these cases, nothing is to be attended to but accuracy in the calculation.

June Term,
1821.

In the case of *Pell v. —*, where there were some special circumstances, the solicitor objected to the confirmation of the report, because he had not been served with a summons to peruse the draft. But the Chancellor said, that practice was not necessary on this reference.

The Master having drawn his report, delivers it without further proceedings to the solicitor of the complainant. If therefore any matter is stated on the attendance, which requires further time to examine or discuss, the Master should adjourn.

The following are some of the most important rules which
(a) 3 Br. C. the Master may be called upon to apply on this reference.
C. 489.
Ibid. 495.
1 Atkins, 75. It is fully established in England that interest cannot be
3 Yessey, 557. computed on a bond beyond the penalty. (a) Our supreme

court has adopted a contrary rule.(b) Whether it would be recognized in our chancery or not, is at least doubtful. There is scarcely a doctrine of equity supported by such a number of authorities. I am aware but of one in contradiction to it.

The following case is of considerable importance ; as I apprehend, it authorizes a computation beyond the penalty, wherever a mortgage accompanies the bond.

"Estates had been conveyed to trustees to secure the payment of bonds in which the grantor was surety. One of the bonds was given on the same day on which the deed was dated.—The Master refused to go beyond the penalties. On exceptions, the Master of the rolls said,—In this case, the creditor has two securities ; one by bond, the other by mortgage. If he sues upon the former, he cannot have interest beyond the penalty ; but the mortgage is to *secure payment, not of the bond, but of the sum for which the bond was given*, together with all interest that may grow due thereon. The same sum is therefore differently secured by different instruments ; by a penalty and by a specific lien. The creditor may resort to either, and if he resort to the mortgage the penalty is out of the question. The mortgage is not for that. The penalty is not alluded to in the mortgage.—Exception allowed." I presume the circumstance of the penalty being recited in the mortgage would be immaterial. The mortgage usually is for the better securing the said debt, or the said *sum of money mentioned* in the said bond, or in its condition.

Clarke v.
Abingdon,
17 Vesey,
107.

Where the principal of a bond is not due, or one or more instalments only have become payable, the Master should report only the interest, or the payable instalments with the interest, as the amount due ; stating that the remaining instalments or the principal are not due.

So reported
in Brinkerhoff
v. Thaltimer,
on file Ass.
Reg. Office.
See 2 John.
C. C.

Although the bond is forfeited, yet the court will not order more of the property to be sold, than is sufficient to discharge such amount, except where the property is not susceptible of a division without injury. The reasons of this are more fully stated in the note to the decree of sale, post. Tit. Sales by a Master,

The rate of interest fixed in the instrument is to prevail until the security is changed by a confirmation of the report and decree.

"Bond with interest at six per cent. ; the time of payment was passed. The question was whether interest at seven per cent. should not be given from the forfeiture. 2 Dess. Rep.

Miss. case,
June 23,
1820.
Miller v. Bur-
roughs.

170, was cited, and 2 Burrows, *Bottomly v. Bumley*. The Chancellor held, interest should continue at the rate contracted for, until confirmation of the Master's report."

JUDGMENTS.

See *Fendall v. Nash*, 19 Vesey, 197.

AS to interest upon judgments, see ante.

The judgment creditor should leave an affidavit with the Master of the true amount due him; for even if it is stated in his answer it may have been varied by subsequent credits.

Ibid.

This affidavit is not proof of the judgment, but is the security the court requires that the sum ostensibly due upon it, is really so.

If the judgment is set forth shortly in the bill, or stated in the answer and not replied to, that will be sufficient proof of it as between the parties; but if infants are concerned, it is advisable to have more formal proof from the records of the court.

SECTION 2.

INFANTS CONCERNED.

Mills v. Dennis, 3 John. C. C. 370.

WHERE the Mortgagor is dead, and his heirs or some of them are infants, the order of reference is this:—
 "It is ordered, that it be referred to one of the Masters of this court to take proof of the material facts stated in the plaintiff's bill of a complaint, and particularly, whether the bond and mortgage, in the plaintiff's bill mentioned, were duly executed, that the said Master compute and ascertain the amount due to the plaintiff for principal and interest thereon: And it is further ordered, that the said Master, under the circumstances of the case, in reference to the amount due to the plaintiff for principal and interest on the said bond and mortgage, and the situation, nature, and value of the mortgaged premises, ascertain whether a sale of the whole, or a part only, and what part of the said mortgaged premises, would be

for the benefit of the said infant defendants ; and that the said Master report on all the matters aforesaid, to this court, with all convenient speed."

In the report of the case of *Mills v. Dennis*, contained in the Appendix to Blake's Chancery, part of the opinion of the chancellor is thus stated.

" It appears to me therefore that the safe and proper course on bills for the sale of mortgaged estates, and when the defendants or some of them are infants, is to direct an enquiry whether a sale would be for the infant's benefit, and also to require the plaintiff on the reference to prove his demand, &c."

Under this a difficulty occasionally arose, on what principles the enquiry as to the benefit to the infant, was to be conducted. And whether the court could interfere and refuse to the mortgagee a sale, in any case however strong, in which it would be more for the infant's benefit, that it should take place at a future period, than at the present.

But the decision as stated in 3d Johnson's Rep. and the 370. form of all the orders shew, that the court intends merely, that the proof of the material matters in the causes and the grounds of its decree to sell the whole or a portion of the premises only, should formerly appear upon the records.

The passage in Mr. Blake's book, which was taken from a manuscript report, is not in the case as published. And the Chancellor states, " that the proper inquiry in such cases will be, whether a sale of the whole, or only of a part, and what part of the premises, will be most beneficial." And again,— " that the Master must report to what extent, and of what part of the premises, (if any part short of the whole) a sale would be sufficient to raise the debt, and at the same time be most beneficial to the infant.

The inability of the infant or his guardian to make an admission renders this proof and report advisable, instead of its being vaguely left to the Master's judgment at the sale, without the reasons of his judgment or at least without the formal proof upon which such reasons are founded, appearing on the proceedings. If the property is therefore proved to be of less value, than the amount reported due, I have always reported that a sale of the whole is necessary. The Chancellor refers to a late case in England of a decree for a sale, where an infant was concerned.

In England, the mortgagee has a right to take the land, whatever may be its value by a strict foreclosure, and sales under mortgages were so unknown there, that in a case as late

Per Lord
Erskine.
Perry v.
Busher, 13
Vesey, 201.

Goodier v.
Ashton, 18
Vesey, 82.
See 1 Madd.
Rep. 287.

Monday v.
Monday,
1 Ves. & Bea.
295.

2 Swanst.
256.

3 Vesey.

Took v.
Hartley,
2 Br. C. C.
126. Perry
v. Barker, 13
Vesey, 197.

as 1811. Although the plaintiff, the mortgagee, consented to a sale, the court would not decree it.

This principle has led to extreme indulgence in enlarging the period of redemption after a decree.

In a more recent case however the precedent has been established of allowing a sale, where an infant is concerned, upon the consent of the mortgagee expressly given, and ascertaining that it would be for the benefit of the infant, by his obtaining an overplus.

Lord Eldon states in *Postlethwaite v. Blythe*, that the rules of the court with regard to mortgages had been strongly impressed on his mind by the conduct of two distinguished practitioners. Mr. Lloyd constantly protested that he never would, on the part of a mortgagee, consent to a sale; and the late Mr. Maddock, who was himself a mortgagee for £20,000 refused his concurrence in a sale to the great dissatisfaction of Lord Thurlow. They both maintained, that the mortgagee was entitled before he relinquished the estate, to have the money, not in the hands of the accountant-general, but in his own." And I also understand that the right to a strict foreclosure is in England reciprocal. The mortgagor has a right to insist upon the mortgagee's taking the pledge, as well as the Mortgagee to take it. This is stated to be so by counsel in 13 Vesey, 204, and the inquiry in *Monday v. Monday*, whether a sale would be for the infant's benefit, implies there was a right to refuse it.

I conceive that the course of the court in Ireland is always to decree a sale, and that a strict foreclosure is unknown. It is the right of the mortgagor as well as of the mortgagee. I conclude this from the statement of Lord Erskine in *Perry v. Barker*, derived from Lord Redesdale, and from a book of Irish practice, *Howard's Equity Side*, page 424. We have adopted the English rule so far as to allow a strict foreclosure. In the case of *Monday v. Monday*, in which Lord Eldon permitted a sale upon the consent of the mortgagee, it was alleged, that there would be a large surplus for the infant; and he sent it to a Master to enquire if a sale would be for the infant's benefit. To determine this would be merely to ascertain, whether the property was worth more than the demand. If it was, the Master would of course report a sale beneficial; if not, he would find it most for the infant's benefit, that a foreclosure and not a sale should be decreed. In case of a foreclosure the mortgagee must either keep the pledge in full satisfaction, or must ascertain the value by a sale, and then if he sues upon the bond for the difference, the foreclosure is opened and he

must be able to get back the estate; and tender a reconveyance upon full payment of the amount due him. (a.)

It renders it therefore nearly impracticable to recover any thing, when the sale has been fairly made to a stranger; and if bought in, that circumstance alone, upon a question of the true value of the property to settle the true difference, would very much embarrass the recovery of the mortgagee.

These facts shew that the inquiry in England is merely whether there shall be *any* sale or not; and this inquiry depends simply upon the question, whether the property is of such a value as will give a surplus after paying the mortgage.

The mortgagee gratuitously consents to a sale, and the court consents for the infant. If it should be found not to be for his benefit, the sale cannot be decreed. But with us, I conceive the mortgagee's *right* to a sale, is an absolute and fundamental part of his rights under the mortgage; and this by the settled and uniform course of the court, which has made it as fixed a principle of the law of mortgages in equity, as a right to an ejectment is at law. Therefore he may demand a sale without regard to the infant's benefit at all.

If I am right in this view, it certainly would be more explicit to frame the order in such a manner as to direct the Master to ascertain whether a sale of the whole property is necessary, and if he finds that a part will be sufficient, then to state what part may be sold most beneficially.

(a) Whatever may be thought of the propriety of those rules, it appears to me very clear, that the above stated course is the settled one in the English court. See 2 Gallison, 152; 159. and 3 Johns. C. 330.

There is a course of practice upon this subject stated in an old case which does not however seem to have been pursued.

"The bill was to foreclose. The defendant appeared and stood in contempt for not answering to a sequestration, and the cause came on upon the sequestration for the bill to be taken *pro confesso*; Mr. Solicitor General for the plaintiffs prayed a decree of sale instead of a foreclosure, because the *security was defective*; and if they should afterwards sue the defendant on his bond, that would open the decree of foreclosure, and he insisted that such decrees were usual. But the Master of the Rolls said, he had never known any, but that where the security was defective it was often referred to a Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto*, as in the case of *Hamden v. Tilly*. But in this case he decreed a sale, because the decree is that the bill should be taken *pro confesso*, and not according to the prayer of the bill; and the case of *Norworthy and Serjeant Maynard* was quoted, where the security being defective the cause stood over, and the plaintiff filed a supplemental bill, and prayed a sale." Mosely, 196. Dashwood v. Bethasey.

The acknowledgment, and record, or the former alone, is sufficient proof of the due execution of the mortgage ; and perhaps the recital of the bond in the mortgage, is proof of the execution of the bond.

19 Vesey, 197. It is perhaps advisable, under the reasons given in *Fondale v. Nash*, to require an affidavit of the amount appearing due, being actually and *bona fide* payable.

See a report where infants are concerned, Appendix, No. 58.

It has been suggested that where infants are concerned, an account of the personal estate ought to be taken ; that the infant heir may have the mortgage paid out of that fund, if sufficient. The general principle is clear, that the personal estate being the primary fund for payment of debts, the heir has a right to ascertain its sufficiency before his land is sold. But in the case of a mortgage it is impossible that this can be requisite under the rules of our court.

It was before shewn, that in England it is wholly against the course of the court to decree a sale, except with the consent of the mortgagee, and where infants are concerned. But after the mortgagor's death, any specialty creditor may procure a sale of the lands descended, by decree of the court ; first establishing that the personal assets are deficient. A mortgagee may therefore procure such a decree ; but in the character of specialty creditor, not by virtue of his mortgage merely ; and of other lands, as well as those mortgaged. Any bond creditor has the same right, the sale being for the general benefit of specialty creditors, although the specific lien by mortgage must first be satisfied.

Atk. 722.

" Thus in *Harris v. Harris*, the mortgagee with other bond creditors brought a bill praying a sale of the premises against the heir of the mortgagor."

2 Br. C. C. 155.

" And in *Daniel v. Skipwith*, there was a mortgage, and the heir and personal representative were the same person. He admitted the deficiency of the personal assets, and a sale was decreed of the lands. The Lord Chancellor said,—If the heir and personal representative had been different persons, it would have been necessary first to have had an account of the personal estate."

Belt's Edit. of Brown's C. C. 2. 155. n. 1.

In Mr. Belt's Edit. of Brown's Reports, the following case is taken from Lord Redesdale's notes. "*Hodgson v. Parker*, 26th July, 1791. Bill by mortgagee in fee against the personal representative, and the heir, for payment of mortgage debt out of the personal estate, as far as it would extend, and

the deficiency to be raised by sale of the mortgaged estate.—
Decree accordingly.”

But with us the case is essentially different. A mortgagee has an absolute right to a sale of the specific property, to pay his mortgage debt, *first* by the power of sale given in most mortgages, (which perhaps may be contended to extend no farther than a sale, by the mode under the statute mentioned in such power.) But *secondly* by the uniform and settled rules of the court, which have established it, as I conceive, part of the law of mortgages, that a sale may be procured under the decree of the court, in the event of a default in payment.

The course of selling mortgaged premises in Ireland is precisely such as with us, and there is a *dictum* in a case which shews that the view I have taken, is correct.

“On a bill for foreclosure and sale, it was charged that the mortgagor, who was dead, left no personal property to satisfy the amount of the mortgage. The court directed the usual account and a sale upon the report being made. Lord Manners after stating the object of the original bill, said the ordinary decree was then made to take an account of what was due to the plaintiff; and an account of the *personal property* of Howard Egan, the mortgagor, was, (and I think unnecessarily) directed.”

O'Brien v.
Connor, 2
Ball and
Beatty, 146.

In Patton v. Page, 4 Hen. and Mum. 449, it was decided that it was not necessary to take the account of the assets.

There is a point of practice upon this subject deserving observation. Whether in a decree of sale, a day should not be given to the infant to shew cause against it after coming of age.

It is a common lay privilege of infants, that a decree should not be taken against them without a day being given.

Lord Hardwicke says,—“The infant comes up on the foundation of that right which he has to make the best defence the nature of the case will allow, for when infants come of age, they are certainly entitled to put in an answer, and make a better defence if they can.”

Bennett v.
Lee, 2 Atk.
531.

“No decree shall be made against an infant without a day given him to shew cause after he comes of age.”

2 Vernon,
342.

“In *Williamson v. Gordon*, the bill prayed a foreclosure, and as to the infants with a day to be given them to shew cause, six months after coming of age. This clause being omitted in the decree, was, upon motion inserted. Lord Eldon said,—They could only shew error. If the decree would be

19 Vesey,
114.

See also Powell on Mort.
442.
1 Atk. 421.

good, had they been adult, it will not be in their power to effect it."

But in the case of *Blatch v. Wilder*, it was agreed that where lands are devised to trustees for payment of debts, and the heir at law is an infant, he has no day given to shew cause on his coming of age; otherwise where there is no devise of lands expressly to any particular person, for in that case he has.

Proc. in Ch.
184.

So in *Cook v. Parsons*, the Lord Keeper said,—“There needs no day to be given to the infant, because the land is devised to trustees, so nothing descended to the infant, and there was no decree against him to join.”

It appears to me that the principle of these cases is applicable to decrees of sale upon mortgages. The land is conveyed to the mortgagee, with a right to sell to pay the specific debt, either in the mode prescribed by the statute, or under the authority and rules of the court of chancery. In neither case is the infant called upon to join in a conveyance.

CAP. XI.

SECTION 1.

SALES BY A MASTER.

THIS subject is of very great importance. Property to a large amount is annually sold under the direction of the court. The superior advantages of a purchase under a decree, from the greater reliance which may be placed upon the title, the power of the buyer of freeing himself from his bargain, if that is found defective or even doubtful, upon a timely inquiry; the facilities given by the court in discovering every thing necessary to ascertain that title, and the ready method of procuring its opinion upon the matter; give to these sales an estimation with the community already considerable, and which would be increased, if these circumstances were more generally understood.

In England these sales usually take place upon bills for the administration of assets, where the personalty proves deficient.

There is but one instance of a sale upon a bill of foreclosure, the mortgagee consenting and infants being concerned. In Ireland, sales are always decreed upon bills of foreclosure.

Monday v. Monday,
1 Ves. and Bea. 275.
Ante.
Howard's Eq. Side. 1. 424.

It is of importance, that the decree should provide for all the special circumstances, which, from the nature of the case, or situation of the property, will probably arise.

The form in the Appendix, No. 59. is submitted, as embracing every thing of a general character, and of ordinary occurrence.

The clause in it providing for the cases, either of a sale of the whole, or of a part only of the premises, where interest, or an instalment only are due, were submitted to the chancellor in the case of *Van Beuren v. Cobb*, and a similar decree was made in the same term in the case of *Henwick v. Macomb*, where the interest only was due.

June term,
1820,

Where a bond is made conditioned for the payment of a sum in instalments, or of the interest at particular periods, different from the time of payment of the whole principal, the bond is strictly forfeited by a default as to one instalment or the interest as well as by a default by not paying the whole principal, when due.

And in such case it would seem, that the party was entitled to the whole principal under a judgment for the penalty, and that the court, under the statute would only relieve against the penalty upon a full payment.

But even courts of law do relieve and stay proceedings upon a judgment for the penalty upon the parties paying the amount of the payable instalment, interest, and costs; the judgment remaining a security for the future instalments.

1 Atk. 118.
Tidd's Pract.
485.

And the principle of this rule is adopted in our court of chancery.

"The bond was payable in three annual instalments, one of which only was due. Before appearance the mortgagor moved that the proceedings should be stayed on his paying the instalment due, with interest. The chancellor compelled him to put in an answer, and submit to a decree of foreclosure, to remain subject to the order of the court, on a future default, paying the first instalment, interest, and costs; and he placed his decision upon the cases at law."

Lansing v. Capron,
1 Johns.
C. C. 617.

So when the court proceeds to decree a sale, it will sell only so much as will pay the amount truly due, for interest or an instalment, unless the property cannot be properly divided so as to raise that amount only.

And the court appears to go upon the principle that the loss of the right to redeem should be co-extensive only with

the actual default, and that right should be taken away only in so much of the property as is equal in value to the amount in arrear.

2 Johns. C.
C. 486.

"In *Brinkerhoof v. Thallimer*, the bond and mortgage were to secure the payment of \$3000 in seven years from the first of April, 1813, with interest annually.

On file, Ass.
Regis. Office.

The Master by his report, dated 9th May, 1817, found a certain sum to be due for interest, and reported the principal to be not yet due. The decree was in the usual form for the sale of the mortgaged premises, or so much thereof as should be necessary to raise the interest due and costs, and which could be sold separately without material injury to the parties or either of them.

An order was also entered, that in case the whole premises should not be sold, the plaintiffs might be at liberty, when further interest or the principal fell due, to get a report upon the foot of the decree of the amount, to the end that an order might thereupon be made for the further sale of the residue of the premises, or parts thereof, to satisfy such amount and costs.

2 John. C. C.
487.

In the case of *Lyman v. Sale*, a similar decree was made. The mortgage was to secure the payment of four several bonds, some of which were not then due; but as the payment of the second bond would become due before the period of six weeks for advertising would elapse, the payment of that bond was included in the order of sale.

It is clear however, that the court has the right to sell the whole of the premises, and that the rule it has adopted is one only of equitable discretion according to circumstances.

The statute recognizes this right.

1 Revised
Laws, 490.

"In cases where a decree of sale of mortgaged premises shall be made by reason of the nonpayment of interest only, or of any instalment on such mortgage, and where a bond, or other instrument with a penalty shall have accompanied the same, and in consequence thereof become forfeited, it shall be lawful for the court to apply the proceeds of the sale of the said premises, as well to the interest, instalment, or portion due, as towards the whole or residue of the demand which has not become due or payable."

I should conclude from this provision, that some embarrassment had arisen in the court, when the proceeds of a sale exceeded the amount reported, interest and costs, whether it had authority to apply the surplus in discharge of the principal not then payable.

The decree of the court may provide prospectively for the application of the surplus, in case of the sale of the whole premises, or for future proceedings, if but a part is sold : and the clauses, in the decree in the appendix marked were inserted in the decree in the case of *Van Beuren v. Cobb*, and approved of by the Chancellor. A similar decree was made at the same term in the case of *Renwick v. Macomb*, in which interest alone was due.

The provision of our statute is adopted in the chancery of ^{Laws N. Jersey, 706.} New Jersey ; and the right of the court to sell the whole of the premises recognized. In the case of the *Fulton Insurance Company v. Jacobs*, a similar decree was entered to that in ^{Ms. Jan. 1823.} *Van Beuren v. Cobb* ; and after a sale of two parcels, a second bond falling due which was not due at the first report, the complainants obtained a report, and a subsequent order for the sale of a third parcel of land. The petition and order are stated in the Appendix, No. 60 and 61.

The Master is bound to sell so much only of the premises as will satisfy the amount reported due, with interest and costs, unless a division of the property would be injurious to the parties or either of them. A provision to this effect is usually inserted in the decree.

If the Master is not sufficiently informed as to the nature of the property, he may require affidavits, or witnesses to be produced as to its value and situation, before he proceeds to advertise.

In England a particular of the estates, and a proposal of ^{2 Fowler, 354.} the parcels to be sold, are laid before him, and the parties ^{1 Turner, 41 & 213.} summoned to attend to settle them, as well as the advertisement and time of sale. Of course this can be rarely necessary with us where a distinct parcel of property is usually pledged for a distinct debt ; but it may sometimes occur, that it would be much to the advantage of the mortgagor to have one of several parcels alone advertised and sold, and proper for him to satisfy the Master before advertisement, of the sufficiency of that portion, and the reasons of his selecting it.

If the Master divides it into parcels, in expectation that some of them will be adequate, he may either advertise those only, and if they prove insufficient, advertise other portions ; or he may advertise the whole, and stop the sale when a sufficiency has been raised.

The subject is in his discretion, according to the greater or less probability of particular parcels proving sufficient.

Webb c.
Webb,
Dickens, 398. It is the English course to insert a provision in the decree, that all deeds and writings relating to the estate be produced before the Master. And an abstract of the title is prepared to deliver to the purchaser.

In Ireland, Lord Redesdale made the following order :
2 Sch. & Lef. 737. " That no lands should be put up for sale by any Master of the court, under any decree or order of sale thereof, until a state of the title of such lands shall be produced to such Master, together with counsel's opinion thereon, that under such decree or order, a good title (such as ought in the opinion of such counsel to be approved by a Master on reference for that purpose) can be made to a purchaser of such lands, under such decree or order, by the means to be specified in such opinion ; and until the title deeds and other documents necessary to make out such title shall have been deposited with the Master, and the Master shall be satisfied (by affidavit) that the statement of the title on which such opinion shall have been given is a true statement of the title of such lands."

1 Turner,
215.
2 Fowler,
306.

In England the sale takes place at the Master's chambers, or if in the country, before the Master's clerk deputed for that purpose. Our decrees, (unless on consent or special cause ordered otherwise) direct that the lands be sold at public auction, in the county in which they are situated, or in the city of New York or Albany if they lie there. Where the sale is to be in the country, the Master may exercise his discretion, where to sell, but it is usual to do it at the county town. It is sometimes directed in the decree.

2 John. C. C. 154. The Master must be present at the sale. A sale conducted in his absence, however fair will be set aside.

Ibid. and
Fowler's
Exch. Prac.
2. 307.

The bidding in England is conducted by each bidder signing a paper specifying the lots, with his name and amount of bid ; and the highest is declared the purchaser.

It is the general practice of the Masters to prepare an article of purchase for the buyer to subscribe, containing also the terms of sale.

This is advisable, though perhaps not strictly necessary.

Sugden law
of Vendors,
41.

It is stated that sales before a Master are not within the statute of frauds.

But it must be noticed that they are not taken out of the act, until the report of sale is confirmed. Proceedings against a purchaser upon a report not confirmed could not be sustained.

The only authority upon the point is,—The *Attorney General v. Day*, Lord Hardwicke there says,—“That purchasers before a Master are certainly out of the statute; nor should he doubt the carrying into execution against the representatives a purchase by a bidder before the Master *without subscribing, after confirmation of the Master's report*, that he was the best purchaser; the judgment of the court taking it out of the statute.”

1 Vesey,
Senr. 221.
See also
Belt's supplement,
115.

The auctioneer indeed is considered as the agent of the purchaser, and his memorandum is sufficient to take the case out of the statute. But this makes it necessary to examine the auctioneer as a witness. It is much more precise and secure, to found process of contempt against the purchaser upon the Master's report, which is best founded upon the party's own signature to the article.

McComb. &
Wright,
4 John. C. C.
650.

The mortgagee may bid at the sale. This is constantly done with us.

It is provided by statute, that no title to mortgage premises derived from any sale made in virtue of a special power for that purpose in the mortgage contained, shall be questioned or defeated in law or equity, by reason that the mortgaged premises were purchased in by the mortgagee, or his assignee, or his legal representative, or on his account.

1 Rev. Laws,
325.

In England an order for leave to bid is necessary.

This was a petition by the mortgagee of premises, mortgaged by the bankrupt, and which had been ordered to be sold, for leave to bid at such sale, and become the purchaser, if no higher bidding should be made.

Ex-parte
Marsh,
1 Madd.
Rep. 148.

Mr. Cooke for the petition,—There is no express decision that the mortgagee cannot purchase the mortgaged estate; but some doubts having been expressed, it was thought prudent to apply for the present order.

In *causes* such an order has frequently been made, as was the case in the estate called *Canons*, purchased by your honor, and there seems no reason why such an application should not be made in bankruptcy.

The Vice Chancellor said,—“There could be no objection to this person being a bidder; it was for the interest of the estate, that there should be as many bidders as possible.”

The Master may adjourn the sale on consent of the parties, or good cause shown. This is well established in our practice, and recognized in the fee bill.

These applications usually come from the mortgagee, but in many cases the Master would be warranted in adjourning,

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in opposition to the ~~mortgagee~~ ^{mortgagor}. If unavoidable accident prevented the presence of a person who would bid, beyond the amount due the mortgagee, upon sufficient proof of that fact, he might adjourn, and if *there were no real biddings*, even after the sale was opened. The mortgagee bids only by the indulgence of the court, as appears from the necessity of an order in England; and in a case where he could not be injured, and was alone concerned, the court would sanction a delay upon reasonable grounds.

But I conceive that the advertisement is a contract of the court with every bidder, a stranger to the suit, that he shall have the property, unless there is a fair advance upon the sum offered by him. Therefore the Master never should adjourn a sale once opened upon a fair bid of a stranger without his consent, for the bidder has at least a right to say, he is the purchaser, unless the court on application will open the biddings; a course our court seems averse to take.

But I consider him so fully the purchaser in such a case, that the Master never could set up the premises again without direction of the court. The mortgagee may however make the advance, and then the Master may adjourn, certainly on the application of the mortgagee, he being held to his bid; and perhaps in a case of a wantonly useless adjournment, the court would refuse him the intermediate interest and costs of the adjournment.

Astor v. Romaine,
1 John. C. C.
310.

It has been determined, that the court will not postpone a sale on the ground of war alone, but that it will interfere in case of any public calamity, such as invasion actual or impending; or extreme sickness, which would suspend all civil business.

On the argument of *Astor v. Romaine*, the case *Corp, Ellis*, and *Sharv v. Macomb*, was cited, in which the court postponed the sale merely on the ground of the unfavorable season of the year, (July) and the moneyed purchasers being generally in the country. But the principles of the decision in *Astor v. Romaine*, seem to overrule this case.

There is one case in which I apprehend that under the principles of English authorities, the Master would have a clear right to adjourn, on the application of the mortgagor alone. It is the course of the English court to favor the mortgagor very much in redeeming the estate, by enlarging the time given in the decree for that purpose. There is a strong instance of this in the time of Lord Hardwicke. But the following case will shew the rules of the court upon the subject with more precision.

Barnardiston's Rep. in
Ch. 221.
Anon.

"The usual decree upon a bill of foreclosure was made for payment of principal, interest and costs within six months after the Master's report should be made, or that the defendant should stand foreclosed. The Master reported the amount which would be due six months from the date of his report, £7876, and appointed that time for payment.

Edwards v.
Cunliffe, 1
Mad. Rep.
287.

Previous to that day, the defendant moved to enlarge the time for payment upon an affidavit of his solicitor, that the estate was worth £15,000; that he had been using his utmost endeavours to raise what was due, by a mortgage. An order was thereupon made, that on payment of the amount of interest and costs, the time of redeeming should be enlarged six months, with the usual directions.

The defendant again moved for further time upon an affidavit of the solicitor of the value of the estate, that he had not been able to raise the amount, but had good reason to believe he should be able to raise it within six months by sale of an estate, which would enable him to pay the plaintiff. On this an order was made enlarging the time for six months upon payment of interest and costs within a fortnight. Another motion was made for further time upon an affidavit of the solicitor, that part of the estate had been sold, and the purchasers were proceeding to complete their purchase, that the first monies were to be applied to pay the plaintiff, and that he believed the whole or a sufficient part of the purchases would be completed in three months.

On this an order was obtained enlarging the time three months on payment of interest and costs, but this order was to be peremptory.

The defendant now moved for three months further time, on an affidavit that the purchases were not completed, owing to some objections to the title, that these were satisfactorily answered, and that he verily believed he should get the sale completed within three months.

The Vice Chancellor.—It requires a strong case to induce the court to make a fourth order enlarging the time for the payment of mortgage money decreed to be paid. If the defendant has done all he could to obtain the money, and has been baffled in his purpose by unexpected delays, and there appears a strong probability of the money being raisable within three months, the court would feel disposed to enlarge the time. The last order does certainly purport to be a peremptory one, but I think the court has sometimes in these cases, given further time, notwithstanding that expression."

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By analogy to this course of practice in England, I apprehend the Master here would be justified in postponing a sale, upon an affidavit of the value of the estate beyond the amount then due, and of the expectation (and grounds of that expectation) of the party being able to pay the amount, within a reasonable time, and upon the actual payment of interest and costs. The reasons, indeed for this indulgence, are less urgent with us, as the mortgagor will receive any surplus, than in England; but the situation of the mortgagee often enables him by *pressing a sale* to obtain a great advantage.

It is usual to make it part of the terms of sale, that a deposit shall be paid down. It sometimes happens that this is refused by the purchaser after the sale, and it then becomes necessary to advertise again, if the parties do not choose to proceed compulsorily against him. The course in Ireland in such a case, is the same.

Howard's
Eq. Side, 1.
426.

"If the purchaser neglects, or refuses to pay the deposit, the court, on the officer's certificate thereof, and on motion, will order the lands to be again set up to be sold."

To avoid this difficulty it may be made part of the terms, that the biddings shall be kept open until the deposit is paid; and the Master in such case should either require it immediately, and if not paid, resume the sale; or give public notice at the sale that it will be resumed as to the parcels upon which the deposit is not made, at a certain future hour.

When the sale is concluded, the deed may by our practice be delivered to the purchaser, immediately upon the payment of his purchase money; and the Master makes one report, embracing all the particulars directed by the order.

The Master also takes a receipt for the purchase money from the complainant or his solicitor, or of the amount due him with interest and costs, if the purchase money is greater, under the general rule of the 23d Dec. 1821: the provisions of which are now made part of each decree.

He files this receipt, with the register or assistant register. It is also usual to file a certificate of the taxation of costs. Under the old practice, the amount paid for costs, as well as that paid on the debt to the parties, always appeared on the register's books; and the credit where the whole was not discharged, could easily be ascertained. The receipt and certificate of taxation will answer the same purpose where the whole amount has not been paid. It is also the duty of the Master to file the mortgage with the register or assistant register, be-

Rule, 72.

fore he delivers his deed, unless the holder of the mortgage prefers having it recorded at length, in the county in which the lands lie. See the form of a report, Appendix, No. 63. and of a Master's deed, No. 64.

By the English practice, the purchaser procures a report of the lot or lots purchased by him, which he moves as of course to confirm. ^{1 Turner, 216.}

An order is made that the report be confirmed, and that the said A. B. be established the purchaser of the estate (or lot mentioned) unless cause shall be shewn to the contrary within eight days after service, in the chancery, and a week in the exchequer. ^{See the order 2 Fowler, Exch. Prac. 308.}

At the expiration of the time of this order, the purchaser moves to make it absolute upon affidavit of the service, and a certificate of the register of no cause being shewn, dated the day of the motion. ^{1 Turner, 216.}

In the Exchequer, this certificate does not appear necessary. ^{See the order Fowler, 2. 311.}

The same practice prevails in Ireland; and the Master in his report of purchase states, that the deposit has been made. ^{Howard, 1. 424.}

Our practice in this particular has been frequently complained of; and in a case in *June term* 1819, the Chancellor expressed an opinion that the English practice was decidedly preferable; that we were getting into greater strictness; and in the case before him, under some special circumstances, directed a report of the purchase to be first made.

There is another consideration which appears to render this course advisable. A case may easily occur, in which it would become a very important question, when the estate is to be considered in the purchaser, so that he would be liable for all losses, and entitled to all advantages, afterwards arising.

In England this point is well ascertained: the estate is in the vendee from the time of the confirmation of his report of purchase, and not before.

"The petitioner having opened biddings upon an estate, and procured a report of his being the purchaser at the resale, presented his petition to confirm it. *Before confirmation*, part of the premises were burnt, not being insured. The purchaser now petitioned to have the loss ascertained, and the amount deducted from his purchase money. ^{Ex parte Minor, 11 Vesey, 559.}

Lord Chancellor,—The question must depend upon this point, what is the date and time of the contract, at which time it can be said to have been complete. Is the bidding in the Master's office the contract between the court and the bidder, or only an authority to the Master to tell the court, that if it

^{In Saville v. Saville, (1 P. Wms. 748.)}

The purchase, after report, is called a Contract between the purchaser and the court.

approves, it may make a contract with him on the terms proposed ?

Let the Master certify the conditions of sale, the date of sale, and reserve the question ; it is one of the most considerable that has occurred for some time. In some of the cases cited, the change of the property is said to be from the date of the report ; in others from the time of the conveyance ; and that though confirmed as the best purchaser, if he has not got the conveyance, he would be entitled to say the estate was not his. That cannot be according to the principle.

The Master having reported the amount of injury, another petition was presented to have the sum deducted.

Lord Chancellor stopped Mr. Romilly in its support, declaring his opinion, that the loss occasioned by the fire must fall upon the vendor, and made the order accordingly, with costs. On a subsequent day he observed, he found his decision confirmed by what Lord Hardwicke says, in *The Attorney General v. Day*, as to carrying a purchase into effect against representatives, after a report is confirmed."

"In ex-parte *Manning*, The Master of the Rolls says,—from the time of the report confirmed absolutely, the estate is bound, and the party who was to convey has become but a trustee for the purchaser, who ought to have the money ready."

Lord Eldon states the point as depending upon this question, viz. when the contract for sale could be considered as made ;—The reason of this is, that it is a settled rule of equity, that if a contract of sale is afterwards carried into effect, the estate is deemed to have been in the vendee from its date.

In *Harford v. Purrier*, The Vice Chancellor thus states the rule—"It is the established doctrine of a court of equity, that if a contract to purchase it to be completed at a given time, and the title is finally made out, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor. The gain or loss falls upon the person to whom the court considers the estate to belong."

It would not be necessary with us that the confirmation of the general report of sale should take place before the estate would be held to be in the purchaser, as the delivery of the deed precedes that, which certainly would settle the point. The only question would be whether the date of the sale might not be taken. It often happens that property is sold upon a credit, and some time elapses from the sale to the delivery of

1 Vesey, 220. and supplement, 115.

2 P. Wms. 470.

1 Madd. Rep. 532. See also Paine v. Meller, 6 Vesey, 439.
1 P. Wms. 62.
2 " 410.

the deed. It would be prudent at least to prevent all question by filing a report of purchase and confirming it.

If this is done, the rule to confirm the report *nisi* would become absolute of itself, without a fresh order, which is necessary in England. The cause shewn against the confirmation would be an order discharging the rule, staying the further proceedings, opening the biddings, or a reference of title.

The increase of expense, would be very trifling. It would not be necessary to adopt the English course entirely, and confine the first decree to directing a sale merely. One decretal order might embrace every matter as at present; and it would only be necessary to insert in it a few words, such as that the Master make report to the court of the best purchaser, and the amount given by him, and that upon confirmation of such report, he execute a deed, &c. as now provided.

There is another part of the English practice of great importance, and which if adopted by our court would render a previous report of sale necessary; and that is—

OPENING BIDDINGS.

SECTION 2.

THIS may always be done before the report of purchase is absolutely confirmed on a sufficient advance. 1 Turner,
217. New-
land, 1. 337.

It has been done after confirmation, but the rule now seems to be, not to allow it on a mere advance. Some special circumstances must exist, as fraud in the purchaser, or his being a trustee.

The person applying moves the court to open the biddings, giving notice to the purchaser and parties in the cause, and stating in his notice the advance offered. If allowed, an order is made, that it be referred back to the Master to allow a better purchaser of the lot in question, upon the petitioner paying to the discharged purchaser his costs and expenses occasioned by his bidding for, and being reported the best purchaser of the premises, and on paying his deposit into court. These conditions must be complied with before the Master can proceed to a resale. 1 Turner,
217.
See the notice.
2 Turner.
1 Turner,
218

1 Turner.
219.

Sometimes the petitioner is directed to be considered a bidder at the sum offered by him, if no other person advances him.

Fowl. Exch.
Prac. 2. 318.
citing Hodges
v. Jones.
May 1781.

In the *Exchequer*, the terms of opening biddings are—"the sum offered in advance, shall bear a considerable proportion in price above the last bidding; that the person opening shall undertake to bid to that amount, and make a deposit double that sum with the master, (double the advance I suppose) pay the costs of the last bidder, and make the deposit on the new bidding within a month from the date of the order."

1 Turner,
217.

If the order is obtained, the property is again exposed to sale. The time of the renewed advertisement seems to be in the Master's discretion.

This practice is of much importance, and has not prevailed with us. The Chancellor observes in *Williamson v. Duk*, 3 John. C. C. 392.

14 Ves. 151.

"that the practice of opening biddings has not prevailed here; that if it ought to be adopted, the case before him was not brought within it, for there was no offer of any specified advance price; that from what fell from Lord Eldon in *White v. Wilson*, it is questionable, whether the practice of opening biddings as freely as they do in England, be not productive of more injury than good.—He says, that half of the estates sold in court, are thrown away upon the speculation, that there will be an opportunity of purchasing afterwards by opening the biddings."

I do not see the force of this observation of Lord Eldon:—A person neglecting to bid before the Master is supposed to do so with the intention of transferring his bid before the court. Of course he is acquainted with the time of doing this, and what will prevent him, if in his opinion the estate is sold below its value, and he is willing to give more, from applying to open the biddings? His intention to bid is supposed; but before the court, instead of the Master. The only injurious effect would be where he is only willing to give an advance which the court does not think sufficient to open the biddings, conceiving it would be enough; but under the rules of the court as to the amount, this never could be sacrificing an estate. It should also be considered that the inducements to bid before the Master are far greater than to wait to open the biddings. The party must in the latter case, pay the former purchaser's costs, and then is not sure of the estate, as a fresh sale takes place.

Ex-parte Mi-
nor.
11 Ves. 561.
16 .. 140.

The objections generally taken to this system, are that purchases are rendered uncertain, and that the buyer is bound, while his claim to the property is not absolute. In *Prideaux v.*

Prideaux, Lord Commissioner Hotham says,—“ On a ground of policy, the court ought to be very slow in opening biddings, as much property is sold under the authority of the court, but justice must not give way to policy.”

1 Coxes cases, 36.

So it is stated by Mr. Fowler, that, “ the court very reluctantly receives applications for opening biddings upon sales of estates under its decrees, for reasons that are manifest; but as these sales are generally in aid of creditors, it is often an object to them, and always to those interested in the surplus, that the fund arising from them should be increased. The court therefore permits biddings to be opened on certain terms.”

Exch. Prac. 1. 318.

Whatever may be the solid objections to this practice, I apprehend that the advantages which occasionally arise from it, will prevent our court from wholly renouncing the right of opening biddings, and holding that a sale under its decree shall not be reached, except in the cases in which it will interfere with a private bargain, as gross inadequacy or imposition. The rules upon the former point are so strict, that even if this case could be considered as one in which the court was called upon to aid the purchaser (and it might assume that shape) and therefore within the distinction between decreeing the performance of the contract, and delivering it up, it would be of little service to sales. The practice now considered is a mode by which the court can redress forced sales, and more probably procure the full price of the property.

3 John. C. C. 292.

10 Ves. 292. *Mattark v. Butler.*

In a case subsequent to *Williamson v. Dale*, the Chancellor seems to have gone some way in sanctioning this course.

“ A sale had been made by a Master under a decree of the court; the plaintiff became the purchaser at four hundred and fifty dollars. No report had been made, nor deed executed. A petition was now presented to vacate an order taking the bill *pro confesso* so far as it related to a claim for any deficiency against the petitioner, one of the defendants, and that the biddings be opened, offering an advance of fifty per cent.

Lansing v. M'Pherson, 3 John. C. R. 426.

The Chancellor clearly denied the first part of the petition to vacate the order, and open the case to a defence, for reasons stated in his opinion. As to the latter part of it, he says,—But I think the sale may be opened without injury or inconvenience in this case, and justice would seem to require it, especially in favor of a defendant, who offers to give fifty per cent. in advance of the purchase money, and who is bound to supply the remainder of this debt, unsatisfied, by the sale. The plaintiff was here the purchaser, and the purchase has not been confirmed, nor the deed executed. Sale opened on

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condition that the defendant *M.* deposit with the register within eight days an advance of fifty per cent. on the sum bid by the plaintiff, and on his paying the plaintiff the expense he incurred of the former sale."

SECTION 3.

PAYMENT OF INCUMBRANCES.

IT frequently occurs that there are charges and incumbrances upon the property, discovered by the purchaser after the sale, and which are not provided for in the terms.

The course in such a case is, for the purchaser to move the court upon notice, that he may appropriate part of his purchase money to satisfy the charge ; or if the money has been paid by him, that the Master or Register may apply a sufficient part of it. If the former is the application, the order should provide, that it be done with the privity of the Master or other officer, as there may be parties personally responsible, who have an interest in the payment being made.

Law of Vendors, 34.

Mr. *Sugden* says,—“ If the estate be subject to an incumbrance which appears upon the report, the purchaser should, after giving notice of his intention, apply to the court for leave to pay off the charge, and to pay the residue of the purchase money into the bank.”

Stretton,
1 Vesey, Jun.
286.

“ The Solicitor General moved, that a purchaser should be at liberty to apply part of his purchase money in discharge of a mortgage upon the estate. Some of the parties who were competent, consented. Some were infants.

Lord Chancellor asked,—If it appeared upon the report that there was such an incumbrance ; and being answered in the negative, said, He doubted whether it could be done even by consent, because there was *nothing to show the court that there was such an incumbrance* ; though perhaps, if all the parties were competent to consent, and did consent it might be done.”

The reason of the Lord Chancellor's difficulty in this case appears to have been, that this was a *motion* merely, and the incumbrance did not appear to the court, except by the statement of counsel. But it is not to be concluded from this case, that a report of the incumbrance is essential. I presume if

authentically brought before the court in any other form, it would be sufficient.

In the case of *Lawrence v. Cornell and others*, after a sale by a Master, it was discovered by the plaintiff and the purchaser, that the property had been sold to pay an assessment, which purchase was redeemable; and that there was an arrear of taxes upon it. Certificates of the street commissioner and collector as to these facts, and the amounts due, were laid before the Master, with a request for a report of sale, and that these charges might be stated in it, which upon notice to the opposite solicitor was given. On this a petition was presented by the plaintiff, praying that these charges might be extinguished out of the purchase money, stating that the premises were represented at the sale to be free from incumbrances.

Ms. Case.
8 Aug. 1820.

The Chancellor.—The facts stated in the petition remain uncontradicted. The premises were at the time of the sale represented to be free from all incumbrances, and the Master's report contains no allegation to the contrary, and it contains the evidence of the facts of such incumbrances, and the certificates show that the evidence came to the Master's knowledge since the sale. The purchaser ought not to be held to his purchase under these circumstances, and we must intend that the lot was sold, and was purchased with the understanding, that the title was clear, and the price bid is to be taken as a fair and adequate consideration for the premises free from incumbrances. It is therefore just, and for the interest of all parties, that the purchaser, or the Master for him should be at liberty to apply part of the purchase money in discharge of these incumbrances, and *Stretton's* case, (though rather an imperfect and unsatisfactory note) contains authority for this direction, as we have, what was called in that case, the Master's report of the incumbrances.

1 Ves. Jr.
266.
ante.

An order was made that the Master pay to the purchaser under the assessment, out of the proceeds of the sale, the amount given by him with the interest payable upon a redemption, and also the arrears of taxes with the interest, and bring the residue of the proceeds into court."

There cannot be a doubt that the certificates would have been sufficient, if produced to the court, without being mentioned in the report. It was on them in effect, as evidence of the charges, that the order was granted.

This order was made on the fact of the sale being made free from incumbrances. The purchaser was not before the court; but it was concluded that he gave to the full value of the property from the statement, that it was sold clear of charges.

I conceive however, that the proper course in these cases is, for the purchaser to move or petition the court upon notice that a sufficiency of his purchase money be applied, exhibiting some proof or vouchers of the charges, a report of his being the purchaser, and an affidavit of his own ignorance of the existence of the charges at the time of sale; or perhaps it would be sufficient to swear, that though informed of them, he bid to the full value, in the conviction that they would be paid out of the purchase money.

It must be admitted, there would be a temptation opened to a purchaser in allowing this, and perhaps the court would require that such an affidavit should be strongly supported by other circumstances, such as the value of the property being no more than the bid, or about its amount, when clear of incumbrances.

If the fact of an ignorance of the incumbrances is established by the purchaser, I apprehend he has a clear right, by the principles of the court, to have part of his purchase money applied.

Serjeant
Maynard's
case.
Freeman's
Rep. in Ch.
1. 1676.

"In this case it was said by Mr. Attorney, that if a man sells another's land, and covenants to discharge it of such particular incumbrances, and before the payment of the money, other incumbrances are discovered, that this will prevent any suit for the money, till all the incumbrances are discharged.

It was said likewise by Mr. Beck, that if there be no covenants against incumbrances, yet, if before payment any are discovered, the party may retain his money, till they are cleared. *Quod fuit concessum per cancellarium.* But it was said by Sir John King, and not denied *per curiam*, that these must be incumbrances made by the vendor himself, or otherwise the vendee cannot detain the money, unless they be covenanted against."

Ibid. 106.
anon.

A case was cited by the Lord Keck, where a purchaser brought a bill to be relieved where incumbrances were concealed; but was dismissed, for he ought to have provided against it by covenants. But it was said by Rawlinson commissioner, that if the purchaser had in that case had money in his hands, that the court would have helped him, but not after he had paid his money."

The rule furnished by these cases, even with the distinction taken by Sir John King, would be sufficiently extensive to reach the generality of cases, because what the owner, the mortgagor, suffered to incumber the property being bound to pay, should stand upon the same footing as what he actually charged upon it. The principle of the rule so stated is, that

the owner commits a technical fraud upon the purchaser by concealing the incumbrances. A case might however easily arise, in which this principle could not be applied with strength if at all; as where a devisee of the equity of redemption is ignorant of charges made by his devisor, or other incumbrancers, also ignorant, are entitled to the surplus.

The reason of the rule seems to lie deeper. I conceive it to be derived from the doctrine of compensation in those cases, in which the vendor is unable to make to the purchaser precisely the estate contracted for; but the vendee can be compensated by a reduction of the purchase money, or security. Lord Thurlow expresses the doctrine, thus:—"However these cases were first established, it is now settled, that wherever it is possible to compensate the purchaser, for any article which diminishes the value of the subject matter, he must be satisfied with such compensation, or to speak in the usual terms, wherever the matter lies in compensation." See the distinctions upon this principle in *Howland v. Norris*, (1 Coxes Cases, 59.) *Poole v. Shergold*, (Ibid. 273.) and *Milligan v. Cook*, (16 Vesey, 1.)

It appears highly important, that every mode should be adopted to render purchasers perfectly confident, that the court will give them a free and clear estate, or release them. That the maxim, *caveat emptor* should be wholly rejected as applicable to the time of bidding; and that time should be given, and every facility afforded them, to investigate the title, and discover charges. Purchasers will then freely bid to the full value of the estate.

The court does pledge itself so far as to warrant the regularity of the proceedings against those parties who are before it. It will not allow the purchase to be invalidated by errors of form in the cause. Bennett v.
Harnill,
2 Sch. & Lef.
576.

SECTION 4.

SUBSTITUTION.

A PERSON may be substituted in the place of a purchaser, upon application to the court, by motion, with notice to the plaintiff and defendant. But it appears requisite, that he should give no more than the original purchase Mason v.
Codwise.

money, and that an affidavit to this effect should accompany the motion. And the party applying should also offer to make a deposit or to pay the money; and no doubt the order, if granted, would be upon that condition.

Rigby v.
McNamara,
6 Vesey, 515.

"Mr. Wetherell moved that one person might be substituted for another, who was a purchaser under a decree, upon consent of the purchaser. The motion was refused on the ground of no payment being offered, by the proposed substitute.

The next day Mr. Wetherell moved on behalf of the new purchaser, that on his paying the money he might be substituted, and the other discharged.

The Lord Chancellor said, this might be an ingenious device, with a view not to come to the court to open the biddings, and he would have an affidavit, that there was no under bargain; for the purchaser might give the other a sum of money to stand in his place, and so deceive the court."

Vale v. Davenport,
6 Vesey, 615.

"Upon a sale before the Master, *Walter* was reported the best bidder."

It was moved that *Griffith* might stand in the place of *Walter*, and that the money might be paid in his name. The motion was upon notice to the plaintiff and defendant.

The Lord Chancellor said, that would not do without an affidavit that there is no underhand bargain between them." The substitution however may be made by consent.

Matthews v.
Stubbs,
2 Br. C. C.
391.

"A motion was made that one person might be substituted in place of another, as purchaser of a lot of an estate sold before a Master for payment of legacies, and an order made on consent of the original purchaser, and all the parties in the cause."

All the parties have an interest that the substituted purchaser should be as responsible as the original one, and this shews the necessity of notice. But if he offer to pay the whole purchase money, the order might be made substituting him and discharging the other upon his complying with such offer; and in such a case I do not see a necessity for notice to the party; though if they are not numerous, it is advisable to do it.

SECTION 5.

The purchaser after procuring his report of sale, and entering the order to confirm it, may proceed to examine into the title.

By the English practice, an abstract is delivered to him, after the sale, and by the Irish course under Lord Redesdale's order, he may inspect the abstract as well as the documents left with the Master, and take a copy from him if he think proper.

If satisfied with the title he moves the court upon notice, for liberty to pay in his purchase money, and to be let into possession of the premises, and receipt of the rents and profits from the quarter day preceding the motion; for the execution of all proper conveyances; the delivery of title deeds, &c. Payment of the money is considered an acceptance of the title, and the order recites the satisfaction of the purchaser with it.

By our practice if the buyer inquire into the title, and an abstract or the title deeds are voluntarily submitted to him, and he is satisfied, he proceeds to pay his purchase money to the Master, or the balance of it, and accepts the deed.

"The purchaser is admitted into the receipt of the rents and profits from the quarter day next preceding the purchase, if his purchase money is paid before the following one."

"A purchaser made an affidavit that he had his purchase money ready lying dead at his bankers since Christmas day before the motion, (June 16) and moved that he might be admitted into possession of the rents from that day.

The Lord Chancellor was of opinion, he should have moved to pay the money into court, which if done on a special application would not have been an acceptance of the title, and ordered the party to be let into the receipts from lady-day past, (twenty fifth March.)

If the purchaser is not content with the title, and wishes to procure his discharge and repayment of his deposit, or the opinion of the court as to any point, his first step is to move for an order of reference to the Master, to see whether a good title can be made.

It does not appear whether this motion is upon notice, or not, but the court would no doubt sanction its being entered of course with us; and from the passage in Turner, I rather think it is of course in England.

The order should contain an authority to the Master to require the production of deeds, &c. and to examine the parties, as it is not inserted in the decree of sale. It should also direct that the parties should lay an abstract of the title before the Master. 2 Fowl. Exch. Pract. 320. When the purchaser has inspected this and the deeds produced, if he has the materials for forming his objections, he should lay a written state-

1 Turner, 223.

1 Turn. 223.
See the order in 2 Fowler's Exch. Prac. 313.

Ibid. 317.
Newland, 167.

Per Lord Eldon,
8 Vesey, 502.
1 Turn. 223.
2 Fowl. 313.
Barker v. Harper,
Cooper's Rep. 32.

1 Turn. 225.
2 Fowler, 319, 20.

ment of them before the Master, and take out a summons upon it.

Ante, Tit.
Production of
Books, a. c.
d.

If there are other instruments not produced, he procure the delivery of them by the course before detailed, and after inspection produces his objections.

Poole v. Sher-
gold, 1 Coxes
Cases, 160.

It is the practice in the Master's office to produce the abstract only; and the Master makes his determination on that alone, if the vendee does not insist upon the production of the title deeds. Lord Thurlow sanctioned this practice, and said, that as the vendee may call for the title deeds before the Master, if he thinks proper, he should take it for granted whenever the vendee omits so doing, that he was satisfied the abstract was correct.

1 Madd. Rep.
533. Harford
v. Purrier.

Exceptions lie to a report of title. In 2 Turner's Practice 146, are the exceptions taken to the report in the case of *Shapland v. Smith*, 1 Br. 74. The report if favorable states that a good title can be made by the means specified in it; as in *Shapland v. Smith*, where the report was, that the plaintiff together with the trustees, and mortgagees, could make a proper conveyance under a good title in fee, by lease and release to the defendant.

14 Ves. 205.

And in *Coffin v. Cooper*, the Lord Chancellor says, "that where the Master's report is, that by getting in a term, or getting administration, the vendor will have a title, the court will put him under terms to procure that speedily."

2 Ves. Jun.
100. Abel v.
Heathcote.
Stapleton v.
Scott,
16 Ves. 272.
See also 11
Ves. 465. R.
C.

The court will not compel the purchaser to take an uncertain title, although its own opinion may be in its favor.

Lord Eldon says,—“That it has been held repeatedly, that, though in the judgment of the court, the better opinion is, that a title can be made, yet if there is a considerable, a rational doubt, the court has not attached so much credit to its own opinion, as to compel the purchaser to take the title.—And in the case before him, although the Master had reported in favor of the title, and Lord Eldon considered the opinion correct, he would not hold the purchaser to take it.

If the decision is against the title, either by the parties submitting to the Master's judgment, or by the court overruling exceptions to the report, the purchaser moves upon notice, and producing a copy of the report, that he be discharged from his purchase, and his deposit restored.

I apprehend also, that the purchaser in such a case, is entitled to his costs. In the case of a reference upon a bill, for a specific performance, if the objections of a purchaser are found valid, he receives costs; and so also, although a good title is made, if the objections when the abstract was delivered

were good, but have since been removed, at least costs to the time of such removal. And with a view to costs, it is made part of the order of reference for the Master to enquire at *what time* the title could be made.

1 Madd.
Rep. 211.
Jennings v.
Hopton.

If the purchaser makes the suit necessary by a frivolous objection to the title he must bear the costs, which he has thus improperly occasioned; but if he states a serious objection, as to which it is reasonable, that he should have the title fortified by the opinion of the court, the court will not compel him to pay costs, although the objection fails. A party who fails can never receive the costs of a suit.

Per Vice
Chancellor,
Thorp v.
Freer,
4 Mad. Rep.
466.

If the decision is finally in favor of the title, and the court will not discharge the purchaser on the ground of any doubt attending it, the purchaser intending to proceed without compulsion moves for liberty to pay in his purchase money, &c. as before stated. With us he would pay the balance and accept the deed.

By statute it is provided, that no greater estate in mortgaged premises shall vest in the purchaser upon a sale under the decree of the court, than would have vested in the mortgagee had the equity of redemption been foreclosed.

1 R. L. 490.
Sect. 11.

By this statute also the Master executes the conveyance and thus a legal title is put in the purchaser without the parties joining in a conveyance. This was formerly requisite on sales of mortgaged premises, and it is now decreed in cases of sales under creditors' bills, &c. both here and in England.

SECTION 6.

If the purchaser neglect or refuse to proceed to complete his purchase the course is this :—

1st. Where the parties are willing to release him, on account of his inability to pay, or the delay of prosecuting him, a motion may be made that he be discharged, and the land resold.

This motion should be founded either upon the written consent of the purchaser, or upon affidavit of his circumstances, and notice to him, and to the parties in the cause.

“ The plaintiffs moved to discharge a purchaser, and that the estates should be resold with the approbation of the Master, stating by affidavit, that since the confirmation of the report, the purchaser was confined for debt in the king's bench prison, had become insolvent, and was incapable of completing his purchase. Notice was given him.

Hodder v.
Ruffin,
1 Vesey
and Beames,
544.

Mr. Bell in support of the motion, and Mr. Richards (*amicus curiæ*) stated that the practice to discharge a purchaser, formerly was different, but the recent practice authorized this summary application. The *Vice Chancellor* observing that the practice was convenient, made the order."

Howard's Eq.
Side, 1. 426.

"If the purchaser lodges a part of the purchase money with the officer, but neglects or refuses to pay the remainder, or to complete his purchase, the court on motion, and upon producing the decree and certificate of the sale, will order the purchaser to complete his purchase, and pay the remainder of his purchase money, or forfeit his deposit. So ordered in the case of the executors of Campbell v. Drake, in this court, 18th February, 1747."

Of course if the purchaser do not go on, the lands will be again set up.

I presume that in general, upon a motion to discharge a purchaser, the court will order a forfeiture of the deposit as a punishment for the delay caused by him; but if his refusal was without fault, as if it arose from an insolvency since the sale, it would direct it to be repaid. Or the court may hold him responsible for the deficiency of a second sale and the costs.

Blackbeard
v. Lindigren,
1 Coxes
Cases, 205.

Whenever a purchaser is discharged, the property must be again offered for sale; the next bidder cannot be reported the purchaser. Indeed by our mode of selling, it would usually be impracticable to ascertain him.

Howard's Eq.
Side, 1. 427.

"In all cases where a purchaser shall decline completing the purchase, the lands must be set up again, for they cannot regularly be sold by the officer to the next bidder on the original *cant*. See the case of *Reilly and others v. Newcomen and others*. Easter Term, 1755.

2. Where the parties would proceed adversely to compel a completion of the contract, the following is the practice.

Saville v. Sa-
ville, 1 P.
Wms. 745.
and cases
cited.

It formerly indeed was the rule of the court, that the vendee should not be compelled, if he submitted to forfeit his deposit.

But now it is decided, that the court will grant an attachment against the purchaser to enforce payment of the money.

14 Vesey,
312.

"In *Lansdown v. Elderton*, Lord Eldon, after hesitating as to his power, made an order that the purchaser should pay in his purchase money within a fortnight, or stand committed, upon the authority of a case in the exchequer. A case in chancery is also referred to by the reporter."

Executors of
Brasher v.
Cortlandt,

"Under a decree of sale, *S. C.* became the purchaser of the premises for \$1600, and paid \$50 deposit. The sale was

confirmed by order, and the Master directed to execute a deed, ^{2 John. C. G. 505.} receive the purchase money, &c. The deed was tendered, but the purchaser refused to accept it, or pay in his money. On the 25th June, an order was made, that the purchaser complete his purchase by paying the purchase money with interest from the time he was reported the best bidder, or that he shew cause the 30th of the month, why an attachment should not issue against him.

On cause shewn, the Chancellor, after citing the above case of *Lansdown v. Elderton*, said he did not mean then to lay down any general rule on the subject of coercing a purchaser by attachment, but he ought not to hesitate under the circumstances of that case, and had no doubt the court might in its discretion do it in every case, where the conditions of sale have not given the purchaser an alternative. That the forfeiture of the deposit would not there be sufficient, either as a punishment to the one party, or a satisfaction to the other.

It was ordered, that the purchaser pay the money in six days, or that an attachment issue."

The English practice is particularly detailed in *Fowler's Exchequer Practice*. In the chancery, it is the same, and is stated, though less minutely, in 1 *Turner*, 225.

"Sir William Yea, having become a purchaser, before a Master, and refusing to perfect it, the following proceedings were had against him. ^{2 Fowler, 318. et. seq.}

1. The Master's report of his being the best bidder, for the lots in question was obtained.

2. An order for confirmation *nisi* was entered, which,

3. Upon affidavit of service was made absolute.

4. A notice was served upon Sir William, that he should shew cause, on the day therein named, why it should not be referred to the deputy remembrancer to see whether a good title could be made to him as purchaser of the lots.

5. An order upon proof of service of this notice, was made, that he should shew cause in a week why the above reference should not be made, and for that purpose, the parties were required to lay an abstract of the title before the deputy remembrancer.

6. This order was made absolute.

7. The Master reported a good title could be made, which by order was confirmed *nisi*, and,

8. This order on affidavit of service (Sir William opposing it) was made absolute.

9. An order was next obtained to refer it to the deputy remembrancer to settle the conveyances.

OFFICE AND DUTIES

10. The officer settled the conveyances, and certified his approbation on the margin of each deed.

The deeds being executed, and attempts to tender them, and demand the money personally, failing, a notice was left at his dwelling house, that the solicitor intended waiting upon him there at a certain time to tender them, and receive payment.

The solicitor attended, and the purchaser not appearing, a notice was left at his house of an application by motion to the court, for an order that he should pay the purchase money into court in one week from its date, or in default thereof that an attachment should issue.

Before this motion, he paid the money.

I apprehend that the practice of our court as pursued in the *Executors of Brasher v. Cortlandt*, is unobjectionable. It is more expeditious. I do not see the necessity of obtaining a report of title, before moving against the purchaser; if any objection of that kind is the ground of his neglect, he himself may procure the order of reference at any time before the day of shewing cause. If he does not, he should be considered as content with the title. If he does, it would be competent for the parties in the cause to take a copy of the order, and prosecute the reference in case of delay.

Another course of practice which has been sometimes pursued with us is, to move that a resale be had, and that the former purchaser be held responsible for any deficiency between the proceeds of that and the former sale.

In the case of — v. —, 11th Feb. and 25th March, 1822, Reg. Lib. 1822, page 285, a purchaser at the Master's sale having refused to make the deposit at the time of sale, the Master adjourned to a future day when the premises were sold for \$200 less. Upon the Master's report of these facts, and an affidavit of the auctioneer of the person being the purchaser at the first sale, (which may be observed clearly was not essential) an order was made on notice of the motion for the purchaser to pay the \$200 the deficiency with the costs within ten days to the assistant register or shew cause why an attachment should not issue against him. Upon affidavit of service of a copy of the order, and a certificate of the assistant register that the money had not been paid, an order was entered for an attachment to issue.

The defendant was taken upon it, and the sheriff took bail for the limits. The complainant then moved on notice that the sheriff be ordered to keep the party a close prisoner but the chancellor considered that an attachment for non-payment

of money was so much in the nature of an execution against the person at law, that such bail might be taken.—See the forms of the orders and affidavit, Appendix, No. 81, 82, & 83.

In the matter of *Williams*, a bankrupt, 1 Sch. & Lefroy, 169. Under the statute providing for the discharge of the bankrupt if arrested for debt, or on an escape warrant, when going to his examination or returning it was held that a bankrupt was exempt from arrest on attachment issued for not paying money into court under a decree.

Lord Redesdale said,—That not the form of the process, but the cause of issuing it was to be considered; if the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as disobedience of an order, where the order was not to recover a debt by the process, the consequences of such a process are in some degree of a criminal nature.

The same point was decided in *ex-parte Parker*. 3 Vesey, 554.

SECTION 7.

THE court will assist a purchaser in procuring possession of the premises by a writ of assistance.

“Under a decree of sale upon a bill of foreclosure of a mortgage, the premises were bought by one Barry, who received a deed, and applied to the defendant Thompson, wife of Thompson the mortgagor, and who had joined in the mortgage, for delivery of possession.—This being refused, he moved upon notice, for an order upon her to deliver possession. Kershaw v. Thompson, 4 John. Rep. 609.

The motion was resisted on the ground that the court had no right to interfere with the possession, but an ejectment must be resorted to.

The Chancellor said,—It did not appear to consist with sound principle, that the court which has exclusive authority to foreclose the equity of redemption of a mortgagor, and can call all the parties before it, and decree a sale of the premises, should not be able to put the purchaser in possession against one of the parties to the suit, and who is bound by the decree.

The chancellor then states the case of *Dove v. Dove*, and *Dickens*, 617, cites other authorities, and adds, that there could be no doubt upon the case, if it had been made part of the decree that the possession was to be delivered. That omission constituted all the difficulty. But that the possession, as a consequence of the purchase, was necessarily implied in a decree directing the sale of land, and a deed to the purchaser. That the possession was within the meaning of the suit, and spirit of the

decree. That in *Dove v. Dove*, there was no special direction in the decree for possession.

He then declares that an order should be granted on E. Thompson the defendant to deliver possession of the premises to B. the purchaser. That if it had been specially directed in the decree, that the defendants who may be in possession, or any person who had come in under them or either of them, *pendente lite*, should deliver possession of the mortgaged premises, to such purchasers on the production of the deed, then a formal writ of execution of the decretal order would have been proper. That an order to deliver, and service of it, must supply the place of the more formal process. That the attachment of the English practice was wholly useless process, and might be dispensed with. The course of proceeding in this case was, the order, then the injunction, and then the writ of assistance."

Complete
Clerk in
Court, 121.
2 Newland
Harr. Dick-
ens, 621.
Equity
Drafts, 617.
1st. 425.

For the form of a writ of execution of a decree, See Appendix No. 66. Of the affidavit of service, No. 67.

For the form of the injunction to deliver possession, See Appendix, No. 69. And of the order upon which it issues, Appendix, No. 68. Of the writ of assistance, No. 72.

In Ireland it is the practice to decree a sale upon bills of foreclosure, and it is stated in Howard's Equity Side, that when a deed of conveyance is executed, upon motion and certificate of the purchase money being paid, the court will grant an injunction to put the purchaser into the possession of the lands so sold to him.

It may be thought advisable by the profession, to insert in the decree the direction as to possession given by the Chancellor in *Kershaw v. Thompson*, as the necessity of a special application for a new order will be thus prevented, and a writ of execution may be taken out at once, without any application to the court.(a)

Writs of execution of a decree, and particularly what are called short writs, appear to have grown into practice from the following reasons.

Complete
Attorney and
Solicitor, 400.

It was the old course to serve the party with the decree itself under the seal of the court, and if he did not yield obedience, all the process upon a contempt was taken out.

(a) By the 52d rule of the court of equity for the several circuits it is directed that in every decree for the sale of mortgaged premises, shall be inserted, that the purchaser or purchasers at the sale, be let into possession of the premises.

And where the decree was for the possession of lands, Lord Bacon's order directed, that if the defendant sat out all the process of contempt, and could not be found by the serjeant at arms, a sequestration should be granted; and if the defendant did not render himself within the year, then an injunction for the possession.

Beames orders, page 15.
Lord Bacon's orders, 26 and 27.

It was upon this order that the six clerks in *Veneables v. Foyle* certified that they found by a rule of Lord Bacon, all process of contempt ought to issue to a serjeant at arms before an injunction should issue for the possession; that they had seen precedents in the reign of Elizabeth and James agreeing with such rule; but they *did not conceive* that the said rule did bind the prerogative of the court, but that if the court saw just cause upon attachment only, to grant an injunction, that there were divers precedents to that purpose.

1 Rep. in Chancery, 178.

In a previous case the same year, the injunction had been issued when the defendant was only in contempt to an attachment.

Underhill v. Witchot, 1 Rep. in Chan. 183.

And it clearly appears by *Dove v. Dove*, and the register's statement in that case (who was considered by Lord Thurlow as the highest authority on points of practice) that this course, notwithstanding what the court decided in *Veneables v. Foyle*, was finally adopted as the regular course of the court; that it was only necessary to go to an attachment, and even that was not served.

It was a natural transition, from serving a party with a copy of the whole decree under seal, to serve him with its substance expressed in a writ under seal, and as the great seal was necessary to put the party in contempt, it was natural to call the process reciting the substance of the decree, and requiring performance, a writ, as the great seal was generally affixed to such. I do not find when this course originated, but a more important change in the practice is fully explained in the case of *Perkins v. Morris*. This was, the granting of what are called short writs of execution.

Dickens, 680.

Mr. Dickens on being applied to by Lord Thurlow, stated, that a writ of execution was necessary to enforce a decree; and as it was said to be the rule, that a judgment could not be divided, but the writ must be of the whole, unless by special order, it was the habit of the court to grant orders for warranting a short or partial writ of execution of the decree; that it seemed reasonable, because a plaintiff might be driven to compel a particular defendant to obey a particular direction, quite unconnected with a multiplicity of other directions, which concern the other parties.

Hugelin v. Basely,
15 Vesey,
180.

The order and writ states, that whereas, it was among other things decreed, &c. and proceeds to command the particular duty. On affidavit of service of this writ, of a demand for possession, and refusal, and of the attachment being taken out, the injunction issues. The order for the injunction is obtained upon a motion of course. Our court has dispensed with the attachment; and perhaps when the subject is fully brought before it, may dispense with the injunction. The disobedience of the writ of execution puts the party in contempt, and I do not see why the writ of assistance might not issue at once on sufficient proof to the court of this disobedience; particularly if the former writ gave a time for compliance, instead of directing an immediate delivery.

There is a loose expression in one of the old cases in *Rep. in Chancery*, that the writ of injunction affected the tenants. Perhaps it means only as to payment of the rents; for it is well settled now, that the tenants, unless parties to the suit, cannot be dispossessed by the process of the court.

Dunn v. Farrell,
1 Ball & Beatty, 122.

See also the decree in *Kennedy v. Daly*, 1 Sch. & Lef. 355.

"The plaintiff had filed his bill to obtain possession of lands from the defendant; and a decree to that effect was pronounced. The under tenants were not parties. The plaintiff was put into possession by injunction from the court. A petition was presented by those dispossessed, stating a demise for their benefit by the *defendant*; that they had held under it till they were dispossessed by the injunction; that they were not parties to the cause, and praying a writ of restitution.

Lord Chancellor *Ponsonby*, made an order that they be at liberty to go before the Master, and be examined touching the interest claimed by them in the lands.

The Master reported in favour of their title, and the cause came up, on exceptions by the plaintiff.

The Lord Chancellor said,—The rule stated at the bar, that no persons but parties in the cause can be affected by the decree is generally speaking correct; and where a decree is against a principal, the plaintiff must proceed at law to recover the possession, if he has not made, all the parties deriving an interest in the lands, parties to the suit; unless the interest was acquired pending the cause. The injunction certainly issued improperly, and the order that has been made cannot be sustained. He directed the plaintiff to bring an ejectment against one of the tenants."

It may be thought advisable to make the tenant party to bills of foreclosure; and then the expeditious process of the court may be used in almost every case. If a person has got possession, *pendente lite*, under any party in the suit, the pro-

cess may go against him, and in case he alleges that he came in under an adverse title, I presume he may be examined, *pro interesse suo*, and according to the result, be dispossessed by the court, or the adverse party left to his ejectment.

And it appears from *Dunn v. Farrell*, that the course for a ^{Ante.} a person improperly dispossessed, is by petition for a writ of restitution.—And no doubt he might adopt the same mode by petition to discharge the order for the writ of execution, &c. when the court will ascertain the derivation of his possession by a reference, if it is not clear by documents.

CAP. XII.

REDEMPTION OF MORTGAGED PREMISES.

REFERENCE ON A BILL TO REDEEM.

THE form of the decree generally made in such a case, so far as it concerns the Master is, “that it be referred to one, &c. to take an account of what is due to the defendant for principal and interest on the mortgage in the pleadings mentioned, and that the said Master do also take an account of the rents and profits of the said mortgaged premises received by the defendant, or by any other person or persons by his order, or for his use, since the day of or which without his wilful default, might have been received thereout. And what shall be coming on the said account of rents and profits to be deducted out of what shall be found due to the defendant for principal and interest. And in case the said Master shall find the said defendant has been in possession and held the said premises, as owner thereof, then the said Master is to set a rent thereon, and take the account accordingly. And in taking the said accounts he is to make to the parties all just allowances, and particularly for all necessary repairs and lasting improvements which have been made by the defendant on the said mortgaged premises since the with the usual directions for examining parties, &c.”

In *Turner's Practice*, the minutes of the decree in the case ^{2 Turner.} of *Delabere v. Bridges*, Jan. 1773, are given in which it is ^{187 and 392.} also directed to compute interest on the lasting improvements ^{391.}

made by the party after the rate of interest carried by the mortgage.

Ibid. 188.

In a note Mr. Turner states, that it seems, of late, the usual decrees for taking an account of rents and profits of mortgaged estates, contain no directions for extending the inquiry to the rents and profits which, *without the wilful default of the accounting party*, might have been received : to authorize the register to insert such directions in the decree, an account to that extent must form specifically a part of the relief prayed, and the bill must be so framed : where the *usual directions* for taking the account are prayed, the decree directs only an account of rents and profits received and the master in carrying the decree into effect, restricts the account accordingly."

1 Maddock's
Rep. 269.

In *Quarrel v. Beckford*, the decree directed interest to be allowed upon the improvements.

2 Sch. and
Lefroy, 224.

In the case of *Gubbins v. Creed*, the decree directs an allowance for such improvements as could be deemed beneficial to the plaintiff upon the defendant's delivering up possession, and an allowance for the expense of planting the trees and orchards alleged to have been planted, or so much thereof as are in a good condition, and a benefit and advantage to the plaintiff. It also directs an inquiry as to the value of the timber cut down ; the defendant to be charged with it, and interest.

1 January,
1821.

In the case of *Burnet v. Claghry* in our own court, the decree was,—“ that it be referred to one, &c. to take and state an account of the principal and interest remaining due of the debts secured to be paid by the two mortgages first above mentioned, and of the rents and profits of the said mortgaged premises which the said *W. G. D.* as purchaser thereof, has received, or might with ordinary care and diligence have received since the time of the said purchase, on the day of to the time at which the Master shall make his report, and also the value of the beneficial and permanent improvements now existing if any, which the said *W. G. D.* has caused to be put upon the said mortgaged premises, and also the injury, waste or deterioration of the said mortgaged premises, or in the value thereof, if any, by the said *W. G. D.* or any person or persons under him during the time aforesaid.”

The party applying to redeem should bring in a charge stating the rents and profits received, or what he claims on the ground of a wilful default in not receiving ; what the party, if in the occupation of the premises, should be charged with as a fair rent, and any charge upon the ground of waste or spoliation : with any other item properly to be brought against the defendant, under the decree.

This is proceeded upon in the usual manner and the parties examined, if the Master is authorized, and evidence procured, as before detailed. When the charge is settled, the defendant's discharge should be brought in, containing a statement of the amount due upon the bond and mortgage, expenditures in repairs, and in improvements, or their value, and all other allowances claimed by him.

When the discharge has been gone through, the report is prepared, a draft issued, and settled as usual.

The decree sometimes directs that the account should be taken with annual rests; the object of which is, to apply the annual excess of the rents and profits beyond the interest, to the reduction of the principal. Formerly this was the *general rule* of the court, but not at present.

"Upon a petition for a bill of review, on the ground, among others, that the Master, in taking the account between mortgagor and mortgagee in possession, had not made annual rests, Lord Hardwicke said,—It is very true, the rule of the court in directing an account between mortgagor and mortgagee is, that wherever the gross sum received, exceeds the interest, it shall be applied to sink the principal.

Gould v.
Tancred,
2 Atk. 533.

But this is often attended with great hardships to mortgagees where, as in this case, the sum was large, £4000 principal, and the mortgagee forced to enter upon the estate, and could only satisfy his debt by parcels, and is a bailiff to the mortgagor without salary, subject to an account; and therefore truly said, the Master is not obliged for every trifling small exceed of interest, to apply it to sink the principal; nor do I know, the court has ever laid it down for an invariable rule, that the Master must always in taking such an account, make annual rests."

"On a bill to redeem it appeared that the mortgage was made in 1793, the principal sum £700. From 93 to 99 the mortgagee received nothing for principal or interest, and the debt then amounted to £1000. In 99 the mortgagee was let into possession. The rent exceeded the annual interest, so that by 1809 the whole interest as well the arrear in 99, as the interest since, was paid. The original principal sum £700 alone remained due. Since 1809 to June, 1813, the time of filing the answer, the mortgagee or his representatives continued to receive the rents which, in each year, were three or four times as much as the interest.

Davis v.
May,
Cooper's
Reports, 238.
1815.

On an application to amend the minutes, the point was in what manner the account should be taken.

For the plaintiffs it was insisted that from 1809, the annual excess of rent should be applied to sink the principal, and that therefore annual rests should be made. The above case of *Gould v. Tuncred*, and two other cases from the register's book, were cited.

On the other side it was urged that the proper mode was, to compute interest on the £700, from the date of the mortgage, and to ascertain the amount of rents received, and to deduct such amount from the aggregate of principal and interest : that the register had searched his book for three years past, and found ten decrees for taking accounts of mortgagees in possession, in only two of which (those cited for the plaintiffs) were annual rests ordered, not in the others ; from which it was clear that it was not the usual course of the court to direct annual rests, unless the case is extraordinary, and where the mortgagor will be materially injured without it. The register had also stated that it was not usual to direct annual rests except under special circumstances.

The Master of the Rolls said his recollection of the form of decrees was the same. Either decrees made annual rests throughout or not ; there was no intermediate case. Here the special circumstances seemed to make the other way." The Master cannot make annual rests in the account without being directed by the decree,

Webber v.
Hunt,
1 Madd. Rep.
13.

" Decree for a redemption, and the usual directions for an account.

A motion was made to amend the minutes, and for a direction under the circumstances, for the Master to make annual rests.

The Vice Chancellor said he had found a difference of practice among the Masters ; some make rests without any specific direction in the decree for that purpose ; and some do not, but merely totalise the principal, interest, and costs, and the rents and profits. The Master is not at liberty to make rests unless directed to do so by the decree.

In *Davis v. May*, the Master of the Rolls held that rests cannot be made, unless specially directed by the decree. In A. D. 1810. *Fowler v. Wightwich*, before Lord Eldon, the Master made rests though the decree did not direct them, which the Chancellor held to be wrong. In *Fates v. Hambly* it appears, on consulting the register's book, that the form of the decree was, " that an account shall be taken of what shall be coming due on account of rents and profits, to be applied in the first place in the payment of interest and principal, and in sinking the principal, and the Master to make annual rests."

In *Atkins* the words are, "in paying the interest, and

This is the proper form of the decree where rests are to be made, but rests can never be made by the Master unless specifically directed by the decree. In the present case annual rests are proper, and the minutes must be altered accordingly.”

then in sinking the principal.

The following case will somewhat illustrate this subject. “A marriage settlement was made to the use of the settlor for life, and in default of issue male, to daughters and their heirs until the remainder man to whom the estate was to go according to the limitations of the settlement, should pay and satisfy unto the daughters £3000.

Blagrove v. Clunn, 2 Vernon, 823.

Judgments were recovered against the settlor, and the creditors filed their bill to be let into a satisfaction subject to the charge of £3000 and some other charges, and in exoneration of the former, to have an account of the rents and profits, the daughters having been in possession of the premises.

The Master of the Rolls decreed the defendants to account for the rents and profits to be applied in the first place to pay the interest of the £3000, and then to sink the principal, as in the case of a common mortgage.

Upon appeal, the decree was affirmed with this variation, “that the defendants should account for rents and profits first to pay the interest; but the surplus should not annually go to sink the principal; nor until an entire sum of £1000 was raised and interest, by perception of rents and profits; and so again, not to sink the principal, until another £1000 was raised.

Same case 2 Vernon, 576. Raithby's Ed.

After a mortgagee in possession has been fully paid principal and interest, he becomes a naked trustee for the mortgagor, and will be charged with interest on his annual balances.

Per Vice Chancellor.—“The fact must be taken to be, that before this suit was instituted, the defendant Beckford was a mortgagee in possession, fully paid the whole of what was due to him for principal, interest and expenditure; and that he had £1572 in hand. All the cases treat a mortgagee, as soon as he is paid, as becoming a mere naked trustee, holding the legal estate for the benefit of the *cestui que trust*, the mortgagor.”

Quarrel v. Beckford, 1 Mad. Rep. 269.

After an elaborate discussion, he observed,—“Upon these principles, I am of opinion that the mortgagor is in this case entitled to charge the defendant with interest, and that it must be sent to the Master to compute that interest.”

The mortgagee is not bound to leave the estate in the situation in which he found it, if the lapse of time will account for the injury.

Russell v.
Smithies,
1 Anstruth.
Rep. 96. *

"On a bill of foreclosure it was referred to the deputy remembrancer to take an account of what the mortgagee had received from the rents, &c. or might have received without wilful neglect in her. It appeared that the premises, malt-houses, &c. had been allowed to fall so much out of repair, that the rent fell from £22 to £18. Plaintiff had done some repairs, and had held 40 years.

Graham argued that the mortgagee in possession, being only a trustee till foreclosure, is bound to keep the premises in the same repair, as if he was owner, and that the diminution in value should have been charged on the plaintiff, as she might have received the difference, had she repaired.

By the Court.—The mortgagee does some repairs; and as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed, that after forty years' possession, the mortgagee is bound to leave the premises in as good condition as he found them."

Godfrey v.
Watson,
3 Atk. 517.

"Lord Hardwicke said,—A mortgagee in possession was not obliged to lay out money any farther than to keep the estate in necessary repairs; but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest."

Powell on
mortgages,
89.

"The mortgagee will be entitled to such expenses as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged; and may certainly add this to the principal of his debt, and it will carry interest."

Lacan v.
Merting,
3 Atk. 4.
1 Wilson, 34.

"A mortgagee of an estate for one, two, or three lives, cannot compel the mortgagor to fill them up as they fall in, but he may do it himself, and add it to the mortgage money, and be allowed it when his mortgage is paid off."

Hughes v.
Williams,
12 Vesey,
493.

"Exceptions were taken to a Master's report; first that he had charged a mortgagee in possession, with the rents actually received; whereas he ought to have charged him with the improved rents at which the estates had been since let by the receiver appointed by the court; and which ought to have been obtained by the mortgagee, but for his wilful neglect or default.

Another exception was,—That the Master had allowed the mortgagee the sum of £68 for the expense of opening a slate quarry, the only benefit accruing to the estate thereby being the sum of £2, received as the produce of the slates.

Lord Chancellor.—I do not mean to say that to charge a mortgagee in possession, actual fraud is necessary. It is sufficient if there is a plain, obvious, and gross negligence, by not making use of facts within his knowledge ; so as not to give the ~~mortgagee~~ the full benefit, that the mortgagee in possession of the estate of the mortgagor ought to give him. If for instance, the mortgagee turns out a sufficient tenant, and having notice, that the estate was underlet, takes a new tenant ; another person offering more ; an offer however not to be accepted rashly. But this case does not furnish this ground : for with the exception of a proposition to give £7 a year for one tenement instead of £5, the rent then paid, there is no proof of any proposal for an increase. A reason is also assigned for not accepting this proposal : that the tenant was in arrear.

The Chancellor then states the circumstance of the mortgagor not giving notice of the fact that a greater rent could be made out of certain persons, nor proposing plans of improvement to enhance the rent as important upon the subject : and proceeds.—I determine this exception upon the principle that a mortgagee, taking possession is to take the fair rents and profits ; and is not bound to engage in adventures and speculations for the benefit of the mortgagor ; but is liable only for wilful default. It would be dangerous to entangle mortgagees in a minute inquiry whether some person would have given more, which was never communicated.

Upon the same principle, I must determine the other exception against the mortgagee. The principle is the safety of mortgagees. The line cannot be drawn. How can it be ascertained that the mortgagor will want a slate quarry ? The amount in this case is inconsiderable, but the principle would reach the case of a mine. The mortgagee therefore, having engaged in this speculation, must speculate at his own hazard.

“ If a mortgagee enter into possession of lands, he is always charged with the utmost value they are proved to be worth ; but if he only enter into the receipt of the rents, he accounts at the rate of the rent reserved. Where a mortgagee in possession finds it absolutely necessary for the protection of the estate to incur extraordinary expenses, he should I think he allowed them, particularly in the present case, where accounts were regularly furnished to Lord Fauconberg, who never appears to have objected to them. Those expenses must therefore be considered as incurred with his approbation. If he had not been apprised of them, I should feel considerable difficulty in allowing them, for even in the case of absolute ne-

Frinlestone
v. Hamill,
1 Ball and
Boatty, 385.
C. Manning.

cessity it is incumbent on the mortgagee to apprise the mortgagor as soon as possible of the necessity of incurring such extraordinary expenses."

1 Rep. Ch.
184.

"This court would not allow interest for rents and profits."

Blacklock v.
Barnes,
Sel. Ca. in
Chy. 53.

"If the mortgagor make proof, that the estate was let at such a price while in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary, which it is in his power to do as being let by him."

There are cases in which the mortgagee will not be allowed for money laid out upon the premises, although in a real improvement.

Viner's Ab.
Tit. Mortga-
ges, x. 1. cit-
ing a case
from Tothill,
231.

"In some cases, the court will relieve where the mortgagee will suddenly bestow unnecessary costs upon the mortgaged lands on purpose to clog the lands to prevent the mortgagor's redemption."

Moor v.
Cable,
1 John. C.
Rep. 385.

"The mortgagee being in possession, had made improvements by clearing part of wild land, and on a bill to redeem, one question was whether he was to be allowed for these improvements. The Chancellor said such allowances appeared to him unprecedented in the books, and not to be allowed consistently with established principles. The defendant elected to enter upon uncultivated lands, and to exercise acts of ownership by clearing a part. To make this allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. Many a debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make.

Decree that the Master compute the principal and interest due on the mortgage; and charge the defendant with the nett amount of the rents and profits received except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary repairs, if any, but not for improvements in clearing part of the land."

Woolly v.
Drag,
2 Anstr.
551.

If a mortgagee advance money for fines on the renewal of leases, he shall have interest on it, at the rate his mortgage carries. "The interest upon the advances must be regulated by the interest upon the money originally lent."

1 Vernon, 45.
Ahon.

A mortgagee shall only be charged beyond his actual receipts, upon the ground of wilful default. "A mortgagee shall not account according to the value of the land; viz. he shall

not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much out of it, or might have done so had it not been for his wilful default, as if he turned out a sufficient tenant that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it."

A mortgagee in fee, at law may commit waste, but never in equity, unless it appears the security is defective. Withrington
v. Banks,
Sel. Cases,
in Ch. 31.
Per Baron
Price.

Counsel in the last cited case say, that the mortgagee in fee after forfeiture may cut down timber at law, as the legal estate is in him, but not in this court, unless it be a scanty security, in which case the court will not restrain a just creditor from his legal privileges; but if it be an ample security, will restrain the cutting of timber."

"A voluntary conveyance was made to A. with a power of revocation upon the tender of one shilling. The tender was made, but not at the place appointed. Afterwards the grantor made a mortgage to B. of the same lands for £500, and after that an absolute assignment for £750 more paid to the grantor. The grantee (B) laid out money in repairs and improvements. It was decreed that A. should redeem paying all the disbursements of buildings and repairs, and B. to account for all wilful spoils and wastes done." Thorne v.
Newman,
Finch's Rep.
38.

A court of equity will frequently stop the interest upon a mortgage, after a tender of the amount due, after forfeiture as well as before.

"A deed in the nature of a mortgage and covenant to re-convey on payment: the money was tendered on the day and place and refused. Deeded the money *without interest* from the time of the tender, and to re-convey; though that the plaintiff ought to have made oath, that the money was kept, and no profit made of it." Lutten v.
Rodd, 2 Ch.
Cases, 206.

The case of *Gyles v. Hall*, is to the same point. "The plaintiff's bill was to compel the re-assignment of a mortgage, and to stop interest from a certain date, there having then been a tender of the mortgage money and interest." 2 P. Wms.
378.

The Lord Chancellor said, in this case it ought to appear, that the mortgagor from that time always kept the money ready; whereas the contrary thereof, being proved, that the mortgagor was not ready to pay it, therefore the interest must run on."

In the marginal note of this case, the reporter says,—“If the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be *uncure prist*.”

If this is the reason of the decision, would it not be more correct to presume that the mortgagor was *always ready* to pay the money after a tender and to require proof on the other side of his being unprepared? If the mortgagee should at any time after, offer to deliver up the premises upon payment and it could not be made, it would be good ground to renew interest. But why the mortgagor should be obliged to retain the money useless, is not clear. The interest is stopped, on account of the unreasonable conduct of the mortgagee, and as a punishment to him; not as I apprehend, because the mortgagor is deprived of interest on a sum kept to discharge the debt.

1 Ch. Cas.
29.

That this is the principle is strongly shown in the case of *Manning v. Burgess*.—"A mortgage was forfeited; the mortgagor told the mortgagee, he had monies ready, and would come and redeem the mortgage. The mortgagee said *he would hold the premises as long as he could; and when he could hold them no longer, let the Devil take them if he would*. Afterwards the mortgagor went to the house of the mortgagee with the money, and tendered it there; but it did not appear that the mortgagee was within, or that the tender was made to him. Decreed a redemption, and the defendant to have no interest from the time of the tender, *because of his willfulness*. A like case between *Peckham v. Legay*."

In the subsequent cases, there is no trace of this rule.

2 Vesey,
Sen. 372.

In *Church v. Bishop*, Lord Hardwicke states,—"*That there are several instances of mortgages, where there are many attempts by a mortgagor to pay them off, and reasonable offers of payment, yet if a strict tender is not made, the court cannot stop the interest, though cases may be where the court wishes to do it.*"

2 Vesey,
Sen. 678.

So in *Garforth v. Bradley*, he says,—"*That the rules are strict that the interest of mortgagees shall not stop but upon a proper tender and notice.*" The notice refers to a clause frequent at that time in English mortgages, that the mortgagor shall give six months' notice of an intention to discharge the mortgage.

See 2 Eq.
Ab. 603.

The stoppage of interest by a tender depends upon the circumstances under which it is made, whether the reasons of the mortgagee in refusing it are satisfactory, or not.

Wiltshire v.
Smith,
3 Atk. 89.

"A bill was brought in 1742 to redeem a mortgage insisting, that interest ought to end the 20th Feb. 1741, because the plaintiff had given six months' notice to pay off the mortgage, and on that day tendered the principal and interest, and a deed of assignment.

The defendant swore he offered to take the money provided he might have time to advise upon the deed of assignment, as there were covenants in it upon which he required counsel if he could safely execute it.

Lord Chancellor.—There is not one case in twenty upon the fact of an absolute refusal after a tender that is ever made out : for they are generally attended with circumstances that explain the refusal. The plaintiff did not as he ought to have done, send a draft of the assignment to the defendant, any time before the money was tendered.

The plaintiff insists that the defendant absolutely refused to take his money, or execute the deed of assignment ; if this had been the fact, it would have been unconscionable and unreasonable in the defendant. Where there are covenants on the part of the mortgagor it is very reasonable that he should have some time to look them over.

In a note, it is stated from the register's book, that this mortgage was by way of term for years, and if the mortgagor had tendered on the appointed day, the term would have ceased, and no assignment necessary : but as default was made in payment, the term became absolute at law, and an assignment was requisite to revest it in the mortgagor."

"An engagement was given by a mortgagee, that on payment of a certain sum (being the principal of his mortgage with interest to a particular day) on a day mentioned, he would reconvey. He died before the day fixed. On the day the money was tendered in a bank bill, to one of the executors (none of whom had yet proved) and he was asked if he had any objection on account of the tender being in a bank bill, and if so, he would change it into money. The executor stated, he did not object to the tender, but would not accept it, as he had not proved the will. On a bill to redeem, it was claimed that interest should not be charged beyond the time of the tender. The Lord Chancellor held that the tender was not strictly legal ; but that the offer to turn it into money, made it so ;—that the executor, before probate might have received the money, and given a good discharge ;—and decreed a redemption on payment of the principal and interest to the time mentioned in the engagement."

1 Eq. Ab.
319. 9. Austen v. Dodwell.

From all these cases I think it manifest that the only principle is, whether the refusal of the tender was on reasonable grounds, or not.

In *Burnet v. M'Claghry*, under the order of reference before Ante. stated, the report set out in the Appendix, No. was made. And the Chancellor confirmed it throughout, hesitating

at first upon the allowance of interest after the mortgage had been fully paid. Upon producing the case of *Quarrel v. Beckford*, to him, he concurred with the Master in that point also.

It should be observed that in this case interest was charged on the annual balances, commencing at the time that the mortgage had been fully paid.

CAP. XIII.

SECTION 1.

ANSWERS.

July 20,
1818.

IT has been directed by the court that upon taking the oath of a complainant to a bill, or a defendant to an answer or plea there must be stated in the jurat, not merely that the party was sworn, but the substance of the oath which was administered.

For the form of a jurat, See Appendix, No. 72.

Of the answer of an infant by his guardian, See Appendix, No. 73.

Of a corporation, No. 74.

Of a foreigner's answer, No. 75.

1 Fowler's,
Ex. P. 420.

The Master should interrogate the defendant whether he had read or heard read the answer, and understood the same, and exhibited it as his answer to the bill of complaint.

Bunbury's
Reports, 167.

A feme covert answering separately must answer by a guardian, that there may be somebody answerable for costs.

1 Fowler's,
Ex. P. 464,
465.

The guardian *ad litem* of an infant should swear to the answer, as should also the committee or a guardian of a lunatic,

1 Harrison,

Tit. Infants, 3 P. Wms. 237. 2 Newland's Pr. 157.

CAP. XIII.

SECTION 2.

REFERENCE OF EXCEPTIONS TO THE SUFFICIENCY OF AN ANSWER.

EXCEPTIONS to an answer are allegations in writing, that it is insufficient, or that the bill is not perfectly answered in a certain point or points, particularly expressed in such exceptions. The court will not refer an answer to be examined upon the surmise, of general insufficiency only.

1 Harrison's
Chan. 228.

"In every case, the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof; and the exceptions shall be invalid as to any matter not so specified."

Rule 57.

Harrison, 1st.
228.

Exceptions must be signed by counsel.

See the form of exceptions in 2 Turner's Pr. 136. and Appendix, No. 76.

Newland, 75.
Rule, 57.

In England, they are filed by delivering them to the defendant's clerk in court; here, to the clerk in court of the complainant.

They must be filed within three weeks after notice of the answer being filed. The plaintiff must give notice of their being filed, and must refer them to a Master, unless he receives notice of a submission to answer them within eight days from the notice of filing. Of course he cannot refer them until after eight days: and such is the English rule.

Rule 12.
Rule 57.

Newland, 76.

But a second insufficient answer may be referred immediately on filing the exceptions.

1st, Harrison,
228.

If an injunction, or *ne exeat* has issued at the prayer of the complainant, he must procure the Master's report in 14 days, or shew cause why he has not done so, or the exceptions shall not prevent the dissolution of the injunction or *ne exeat*.

Rule 57.

So in England, if exceptions are shewn, as cause against the dissolution, the court requires the plaintiff to procure the report in 4 days.

Newland, 77.

This time being often insufficient, the Master sometimes certifies, that it is too short, and procures an enlargement, or allows less time than usual on his warrants.

Ibid.

Even here the time is often found too short, as a summons runs to the 5th day. In many cases, there is nothing, within the duties of a Master, requiring more deliberation than exceptions; and it is another instance to shew the propriety of allowing the Master to diminish the time of his summons; for

though cause may be shown, why the report was not procured in time, the expence of affidavits, or a special certificate of the Master, will at least be necessary. The order bill, answer, and exceptions being left with the Master, a warrant is taken out underwritten. "To proceed on the exceptions to the defendant's answer."

1 Turner,
477.
Ibid.

This is the first warrant, both in England and here.

In England the defendant's clerk in court has been furnished with the exceptions, and the party therefore need not apply for a copy at the Master's office; and the contrary practice stated in Harrison is not correct.

1 Harrison,
230.

Here he is served with a copy by the solicitor when notice of the filing is given.

1 Turner,
477.

"In proceeding upon exceptions, the course is for the plaintiff's solicitor or counsel, to state the subject, shape and prayer of the bill, and to read the first exception. The defendant's solicitor then reads from the answer, such parts as he insists is an answer thereto, and each counsel argues on the point. The Master will then allow, disallow it, or suspend his opinion, and thus all the exceptions are gone through."

1 Turner,
462 and 477.
Fee Bill.

Warrants to proceed on the exceptions are successively taken out, until the Master has made up his opinion. It is in this mode that further argument may be had upon them, and that the parties know the decision of the Master. With us, the Master adjourns the further hearing. If he does not decide at once and apprise the parties of his determination, he should fix a day for them to attend, when he will be prepared, and then deliver his report to the prevailing party, which is the complainant, if a single exception is allowed.

1. Harrison,
230.
Dickens, 732.
1 Turner,
462.
Fee Bill.

No draft of the report nor any warrants to settle or sign it issue. Objections therefore need not be brought in, to warrant the taking of exceptions. These may be filed in the first instance.

May, 1821.

In the case of *Campbell v. Campbell*, the following brief was prepared, which enters fully into this point of practice.

A motion is to be made to take the report of the insufficiency of the answer, off the file, on the ground that the defendant's solicitor was not summoned to hear it read or settle it, after it was prepared by the Master.

After a regular summons, and adjournment upon it by consent, the Solicitor and counsel of the defendant, and the counsel of the plaintiff attended, and a full argument was had upon each exception, on the 8th of May.

The Master, at that hearing, informed the solicitor of the defendant, what exceptions would be allowed, and what dis-

allowed. He delivered this report to the complainant's solicitor, the 12th May, without further summons to the party. It was filed, and an order entered to confirm it of which notice was served.

It is said this was irregular, that the Master should have summoned the defendant, after drawing the report to hear it, or settle it, for the purpose of having another argument.

Mr. B. relies upon the statement that this is the uniform practice with us. This in the first place is not wholly correct. Mr. Bolton states he does not consider it necessary, although it has been done in his office, when solicitors have requested it. In all the cases of exceptions to answers before me since I have been a Master, I have never prepared a draft, nor consequently issued a summons to hear report or settle it. In *Nourse v. Prime*, and *Green v. Winter*, the report was delivered as soon as drawn, to the successful party.

But suppose it admitted, that it is the more general practice. It clearly is not derived from, nor supported by any rule, or decision. That of *Remsen v. Remsen*, most unquestionably does not govern it, as will be shewn afterwards.

It is contrary to the established English practice, as settled by cases, and acknowledged and laid down in all the books of practice.

In *Harrison's Practice* it is said,—“When the solicitors on each side attend at the time and place appointed, the order of reference is produced, and the Master looks into the office copies of bill and answer, and the exceptions, the solicitors suggesting to him their reasons why the answer is or is not sufficient.” 1 Harr. 230.
Ed. Phil.
1807.

The Master then gives his opinion upon the exceptions as to the sufficiency or insufficiency of the answer, and certifies the same in a report to the court. The report when signed by the Master, is taken away by the party in whose favor it is made, and carried to the report office to be filed.”

After stating the attendance of solicitors, and argument by them before the Master, and the course to proceed ex-parte, it is thus laid down in *Hind's Practice*,—“The Master gives his opinion upon the exceptions as to the sufficiency or insufficiency of the answer, and certifies the same in a report to the court ;—The report when signed, is taken away by the party in whose favor it is made, and carried to the report office to be filed. This report or certificate needs no further act of the court for confirmation, and consequently *no objections* to it can be brought into the Master's office.” Hind's Prac.
263.

1 Turn. Prac.
477. 5 Edit.

So in Turner's Practice it is stated,—“That the manner of proceeding on exceptions to an answer is this—the plaintiff's counsel briefly state the subject, shape, and prayer of the bill, and then read the first exception. The defendant's counsel reads from the answer such parts as he insists is an answer thereto, each counsel arguing the disputed points which arise. The Master then determines to allow or disallow the whole or part of such exception, and in this manner all the exceptions are gone through. When the Master has made his report, it must be filed in the report office, and an office copy taken.”

Page 462.
See preface.

In the bill of costs on a reference of exceptions (which is a good guide of the practice, as it was taken from actual business, and had been taxed by the Master) there is a charge of attendance on a warrant “to proceed upon the exceptions, when the Master went through all the exceptions, and allowed several of them.”—And the next charges are, for the report, attendance to get it, and for filing it. No warrant on the draft of the report, nor to settle it. No attendances upon such warrants, and no charge for such draft.

The same is the practice in the Irish exchequer.

Howard's
Eq. Side,
445, 6.

“If the attornies for both parties attend the baron at the time appointed by the summons, he hears them on the bill, answer, and exceptions, and delivers his opinion in the presence of the parties attending him on the one side, or the other, as the matter appears to him, and afterwards makes his report; but if there be any matter of difficulty in the case, the bill, answer, and exceptions are left with the baron, and he takes time to consider thereof.

Ibid. 446.

And the report, when drawn up, and signed by the baron, is given to the attorney for the party in whose favor it is made; who may forthwith move the court for the first rule for confirming.”

1 Turn. 228,
9.

In all these statements of the practice, from books of high authority, there is no trace of the issuing a draft and summons upon it; while in cases of references, as upon accounts, where it is the course, they are particular in detailing these steps. And in the following case, the reasons of the difference appear, and the case itself seems decisive.

Price v.
Shaw, Dick-
ens, 732.

“The Solicitor General applied, (supposing it necessary) that the Master might receive objections, to warrant exceptions to the report, that an examination was impertinent. The Lord Chancellor directed the register to make known to him the course of proceeding. He stated,—that he understood, there was no judgment of a Master, which, if dissatisfactory, might not be corrected in one of the following modes :—

Where a report is under an order to approve of a guardian, allow maintenance, and the like, exceptions do not lie, but the report is stated and brought before the court, by petition, and the court will confirm or vary it, according as it coincides in, or differs from, the opinion of the Master.

When the Master by his report finds a fact, and his judgment is founded on evidence, he delivers a draft of his report, before he signs it, that the parties may take objections; without which, unless by special order, they are precluded from exceptions.

But where the reference is, to see whether an answer, examination, or deposition is pertinent or impertinent, the Master's judgment is founded merely on his conception of the matter. These reports are not confirmed, *he issues no draft to ground objections*; but the party takes exceptions to the report in the first instance.

Lord Thurlow afterwards stated,—The petitioner had of course a right to except to the report."

Although the register does not specify a report of the insufficiency of an answer, yet clearly it is within the same principle, and the practice has been according to this case, as the before cited authorities shew.

The good sense and reason of the difference is this. If inquiries as to matters of fact, or accounts, are gone into by a Master, the materials to enable him to form a judgment, are collected from evidence, examination of parties, &c. in the progress of the reference; but his conclusions from that evidence, the principles upon which he makes up his decision, the manner of stating the account, are in a great measure unknown, until he reduces them into form in his report. The parties then want an opportunity of shewing those conclusions to be erroneous, or those principles inequitable. And it is also necessary, that something should limit the production of further testimony, which is done by the summons to settle. But in the case of an answer referred for insufficiency, the bill answer and exceptions contain all the materials upon which the judgment is to be formed; the parties argue upon those materials, and upon no other. The Master states his decision upon the points at that time, or if he is in doubt, or wants further argument, or the exceptions are not gone through, may have the parties again before him upon another summons to proceed ~~an~~ an adjournment. But when his decision is clearly made and communicated, ought it to be allowed, that the expense of another litigated attendance by counsel, of preparing a report, and a summons upon it, and a delay with us of five

days, should be incurred, for the possible chance of changing the Master's opinion? The test whether this change *should have been made* is, the subsequent decision of the court, and the party, if he obtains that in his favor, suffers no injury from want of a double argument upon the same subject.

The English order upon which their present practice upon reports in matters of account, &c. is founded, shews in my opinion the truth of the reasons for the distinction in the cases.

Order, 29.
Oct. 1683.
Beames
orders, 252.

"It recites the delay and expense happening to suitors by exceptions taken to reports, made in pursuance of orders upon hearing, and especially such whereby accounts are directed to be taken, *which might be in a great measure prevented, if the Master were informed of the matter of such exceptions before the signing and allowing of such report*, and directs that the Master, to whom a matter of account is referred, or other matter, by any order upon the hearing of the cause, when he hath prepared his report, shall give out a summons, that both parties shall again attend him, who may peruse his report, and take a copy, bring in an exception in writing, and take out a summons upon it, and then the Master will settle his report, as he finds just."

Now the ground of this is, that the Master, if the objection to his conclusion *was pointed out*, might be convinced, and alter his report: and this is the reason why exceptions shall not be filed without objections brought in. But in case of an answer referred, the Master is informed of the objections of parties, and hears arguments upon them.

2 Johns. 502.

The course of practice laid down in *Remsen v. Remsen*, is confined to matters of account and inquiries into facts, and is very similar to the directions of the above order.

"That after the examination is concluded, in *cases of references to take accounts or make inquiries*, the parties, their solicitors or counsel, after being provided by the Master with a copy of his report, ought to have a day assigned them, to attend before the Master to the settling of his report, and to make objections in writing."

Where there are several exceptions, the report must specify the exceptions, or parts of exceptions allowed or disallowed. This was always the rule, on a reference of a first answer; but until lately, where a second answer was referred, the Master found it generally insufficient, if one exception was pointed out to him and allowed.

The *Complete Clerk in Court* contains the form of a report on a first answer, which runs thus. ;—

“ I find that the defendant’s answer is insufficient in several points, particularly in, &c.”

“ The form of the reference is to look into the answer, and see whether it is sufficient or not, in the points excepted to. Then the defendant is told by the report, whether it is insufficient in all or any, and which of those points, but if there are twenty exceptions to the second answer, the Master’s attention is called only to one ; the second reference being only whether the answer is sufficient, which I should think ought to be construed with reference to the points excepted to. The practice however is uniform, that the Master looks only at the one pointed out ; and if as to that, the answer is found insufficient, it is all candour and courtesy afterwards.”

1 Vesey and
Beames, 333.
(note 1) 1811
Rowe v.
Gudgeon.

Afterwards the point was brought before the court, in the same case, on a motion, that the Master might be directed to specify what particular exceptions taken to the several answers, he had allowed, and what disallowed, that the additional answer might be applied to such exceptions. Ibid. 1813.

Lord Eldon expressed his strong disapprobation of the practice upon a second answer, before mentioned, saying—“ It was impossible that it could be right, that a defendant is to fail in his endeavours to answer several exceptions, because he has failed in answering one ; and that the suitor had a right to the Master’s judgment upon each of the exceptions.”

And in the case of *Agar v. Gurney*, the practice was finally decided, that the Master must go through, and give his opinion upon all the exceptions upon a second, as well as a first answer. 2 Mad. Rep.
389.
Agar v.
Gurney.

For the forms of a Master’s report, See Appendix, No. 77.

The points which arise upon this reference for a Master’s judgment are :—

First.—Whether the bill has laid a sufficient foundation for the inquiry in the exception.

Secondly.—Whether the question is material to the matter in issue.

Thirdly.—Whether it is not fully or sufficiently answered, admitting a full answer ought to be given.

Fourthly.—Whether the defendant has not a valid defence against answering further, or at all, to the matter.

1. The foundation necessary in the bill for an exception consists in a sufficient statement of the fact, and a sufficient inter-

rogatory. As to the statement, the rule is, that there must be a statement, or charge of a fact, to warrant an interrogatory, and that such statement must be coextensive with the inquiry.

6 Vesey, 62. In *Muckelstone v. Brown*, Lord Eldon said :—

“It is observable upon the interrogating part of the bill, that part does not in terms connect itself with any trust necessarily confined to a secret trust for charitable purposes. I agree if all the allegations of the bill are necessarily confined to such trust, the interrogating part must be construed according to the alleging part ; and is not to be considered more extensive than the propositions out of which those interrogatories arise.”

Lord Hardwicke,
2 Vesey,
Sen. 538.

“The rule is, you are not only to question in the interrogatory part, but to make charges in the charging part, otherwise you cannot except.”

Jaques v.
Methodist
Church,
1 John. C. C.
76.

“It is well understood, that if the defendant be specially interrogated, it can only be to the facts alleged and charged in the bill. The one cannot be more extensive than the other.”

This rule must be understood with the explanation, that every thing incidental to a fact, may be enquired to, under a statement of that fact.

11 Vesey,
376.
Bullock v.
Richardson.
11 Vesey,
296.
Faulder v.
Stewart.

“If a distinct fact is alleged, the plaintiff may enquire into every thing incidental ; as, what, how, when, &c.”

“There was a general charge, that £500, an alleged consideration money upon a purchase had never been paid ; and special interrogatories, when, where, by whom, to whom, and how it had been paid, were in the bill. On exceptions for not answering to these facts, Lord Eldon said—It depends upon this, whether there is such a charge in the bill, as to the payment of the consideration, as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, &c.

I have always understood, that general charge enabled you to put all questions upon it, that are material to make out whether it was paid ; and it is not necessary to load the bill by adding to the general charge, that it was not paid, that so it would appear if the defendant would set forth when, where, &c. The old rule was that, making that substantive charge, you may in the latter part of the bill as to all questions that go to prove or disprove the truth of the fact so stated.”

Mitfords
Plead. 45.

“A variety of questions may be founded on a single charge, if they are relevant to it. Thus if a bill is filed against an executor for an account of the personal estate of the testator ; upon the single charge, that he has proved the will, may be founded every inquiry which may be necessary to ascertain the amount of the

state, its value, the disposition made of it, the situation of any part undisposed of, the debts of the testator, and any other circumstance leading to the account required." What is incidental, and what a substantive and distinct fact, must be the subject of a Master's discretion. A statement made by way of charge in the charging part of the bill is sufficient to warrant an interrogatory. 3 Atkins, 626.

As to the interrogatory, it is settled—That the general interrogatory, common in all bills, is sufficient to call for a full disclosure. Jaques v. Methodist Church, 1 John. C. C. 75. Cooper's Plead. 11.

It may be worth observing that Chancellor Kent does not mean to confine a general interrogatory, to the precise terms used in the bill in *Jaques v. The Methodist Church*—Words substantially the same are enough.

As this general interrogatory is the substitute for, it may also assist defective, special interrogatories. The comparison is only to be drawn between the allegation and the exception, which may be considered a special inquiry; and it can only be in a case, hardly to be supposed, in which the general is omitted, and special inserted, that the Master must look, that the exception does not exceed the interrogatory as well as the allegation.

If the bill does not contain a proper allegation, yet if the defendant has answered to the matter of the exception at all, he must answer to the whole exception.

The following authorities appear to warrant this position.

"Although there is no particular charge in the bill, yet in the interrogatory part, there are questions relating to the matter. The rule is, you are not only to question in the interrogatory part, but make charges in the charging part, otherwise you cannot except, but the defendant, though not bound to answer to it, has done so, which being replied to, it is put in issue properly; consequently that informality in the manner of charging, (for it is no more) is supplied by answering to it; for a matter may be put in issue by the answer as well as by the bill, and if replied to, either party may examine to it." Per Lord Hardwicke, in Attorney General v. Whorwood, 1 Vesey, 338.

"On exceptions the Master reported the answer insufficient in the points excepted to, then the defendant fully answered the charges of the bill, but in truth the exceptions went beyond the bill. The Master reported this answer insufficient in all the points excepted to. Upon exceptions to the report, it was insisted, that the defendant ought not to be put to answer any thing that was not in the bill. But it was replied, that inasmuch as, he did not except to the first report, but had Crisp v. Neville, Chan. Cases, 60.

answered, he had admitted he ought to answer to all the matters of the exceptions, and so it was ruled."

If the defendant is held to answer exceptions merely from an implied admission, that he ought to answer, drawn from his neglect to except, much more should he answer, when his admission is made stronger by having answered in part.

2. Another point upon which the sufficiency of an answer is to be judged, is, whether the inquiry in the exception is material.

*Agur v.
The Regents
Canal Com-
pany,
Cooper's
Cases, 212.
1815.*

The right of a Master to judge of the materiality of a question is settled. In this case the Vice Chancellor said,—
"The question brought on by the exceptions to the report was reduced to two heads.

1st. Whether if points excepted to are irrelevant and immaterial to the points in question in the cause, the Master is competent to consider the materiality or not. It is contended, that if the defendant does not protect himself by plea or demurrer from discovery, he cannot by answer object, that the questions are not material, unless he has referred the bill for impertinence, which is a course that may be taken where immateriality is objected to the bill. The question is of great importance because of daily occurrence. The direct question upon an answer does not appear to have arisen in any of the printed cases. I considered it important to consult the Masters as to their practice in this respect; and they have all, without one exception, stated their uniform practice to be, that if the questions are quite immaterial, they disallow the exceptions; but if the discovery can in any way assist the plaintiff, they allow the exception.

I have further thought it my duty to communicate with Lord Redesdale who expressed to me, that he had not the least doubt; that the constant uniform practice of the court of chancery in all his time, concurred with that of the court of Exchequer, and with the opinion of the Masters."

*Sel. Cases
in Chan. 53.*

In Paxton's case it was said,—
"A man is not obliged to answer any question, which may subject him to a penalty; any thing else material he must."

The test of materiality is, whether the fact if disclosed, can aid the plaintiff in getting the relief sought by the bill.

*Per Lord
Thurlow,
2 Vesey, Sen.
399. note.
Lord Hard-
wicke in
Finch v.*

"A discovery need not be given of what is immaterial to the relief prayed by the bill."

"As to the merits whether the matter is relevant and material to answer, two general grounds are insisted on to show this is material. First, that every plaintiff is entitled to a

discovery from defendants as to two heads, to enable him to obtain a decree ; and to ascertain facts material to the merits of his case, either because he cannot prove, or in aid of proof ; for a man may be entitled to an answer of what he can prove, to save expense. Next to substantiate his proceedings, and make them regular in this court.”

3. Whether the question is not fully or sufficiently answered, it being allowed the plaintiff is entitled to such an answer.

This is usually the nicest and most litigated point on a reference of an answer for insufficiency, and the general rules are continually questioned, distinguished, or evaded.

In estimating the force of such rules it should be remembered, that a plaintiff calls upon a defendant to disclose facts which he cannot prove, or are difficult to prove in any other mode ; that he is made a reluctant witness against his own interest ; and yet that his testimony has a weight beyond that of any other witness. A Master should therefore be very scrupulous in disallowing an inquiry, which can in any degree tend to elicit the truth, or enlarge the means of detection.

One of the primary and oldest rules is,—that a charge must be answered in substance, not merely literally, making a negative pregnant.

“ If the defendant deny the fact, he must traverse or deny it (as the cause requires) directly, and not by way of negative pregnant. As if he be charged with the receipt of a sum of money, he must deny or traverse that he hath not received that sum or any part thereof, or else set forth what part he hath received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point of substance positively and certainly.”

Lord Clarendon's orders, Beames Ed. 179.
1 Harr. Ch. Pr. 302.
Copied from Lord Bacon's orders, Sect. 63.

“ In *Woods v. Morrell*, Chancellor Kent states and sanctions this rule, nearly in the terms of the above order.

1 Johns. C. C. 107.

Wherever there are particular and precise charges, they must be answered particularly and precisely, not in a general manner, though the general answer may amount to a full denial of the charges.

This rule is stated in the words of Lord Redesdale, and adopted in *Woods v. Morrell*, ut supra.

Mitt. Tr. 246.

The following case will illustrate it :—

“ The defendant was called upon to set forth, whether he had received particular sums of money specified in the bill, with many circumstances as to time when, of whom, &c. He set forth a general account, by way of schedule, and referred

Hapburn v. Durand,
1 Br. C. C. 503.

to it in his answer, as containing a full and just account of all sums of money received by him. On exceptions it was held insufficient." There was here a strong negative by inference, of the charges in the bill, where they differed from the schedule.

Paxton's
case, Sel.
Cases Ch.
53.

"If a man gives a general answer, and a particular question be asked, which is included in the general; yet he must answer it particularly, else it may be demurred to, for *that may be a matter of judgment.*"

The same rule prevailed in the Star-Chamber; the practice of which court was very similar to that of the court of chancery, probably because the Chancellor was the chief officer.

Treatise on
the Star
Chamber part
3. Sec. 11.
Apud. Har-
graves, Coll.
Jurid. 2 Vol.
171.

"The defendant is tied to give a precise and direct answer to the articles, as well concerning the fact charged, as any circumstances, which are pertinent to reveal the truth."

The rule is not confined to a denial of a fact, but extends to an admission also; and for the sound reason given in Paxton's case, that it is matter of judgment. The admission may appear satisfactory to one mind, and insufficient to another. In the two last authorities, the language is general.

Harr. Prac.
1. 368. Tit.
answering,
cites orders in
Chan. 121.

"An answer ought not ordinarily to set forth deeds in *hæc verba*; and though the bill prays they may be set forth, yet if the defendant in his answer says, he is ready to let the plaintiff have copies of them; or if he does not say so, but sets forth only a part of them, it is sufficient, and will be well enough; and the court will order that the plaintiff have liberty at his own charge, to take copies of them, without sending them to a Master; or order the defendant to produce them on the examination of witnesses, &c."

Tit. Excep-
tions.

In the Practical Register it is said,—"*If deeds are required to be set out in hæc verba, and are not, exceptions will lie,*" quoting Harrison. I do not find any thing in Harrison upon the subject but the above passage.

The rule as to precise answering seems relaxed, where the answer is sufficient to a common intent.

Pract. Reg.
201.

"If the answer be good to a common intent, the plaintiff must reply, and prove the matter of his bill to be true, if he can, and not insist upon the insufficiency of the answer. This seems to be intended as to things *publicly done*, and not resting in the defendant's knowledge only; for the defendant ought to answer secret transactions, with certainty."

Citing Prac.
H. C. Chan.
107.

A party is entitled to a discovery of what can be proved, to save expence.

Lord Hard-
wicke, 2 Ve-
sey, 492.
Lord Claren-
don's orders,
54.

"An answer to a matter charged as the defendant's own fact, must be direct, without saying that it is to his remembrance, or as he believeth, if it laid to be done seven years be-

fore, unless the court, upon exception taken, shall find special cause to dispense with so positive an answer."

"If a fact be charged, which is in the defendant's own knowledge, he must answer positively, and not to his remembrance or belief, and as to facts not within his knowledge, he must answer as to his information *and* (a) belief, and not to his information or hearsay merely, without stating his belief one way or the other."

The latter is the English rule also.

The following case is a lucid explanation of this rule:—

"On exceptions to a report, the Chancellor said,—The first exception to the answer is, that the bill having set forth, that a certain petition was presented to the circuit court, by J. B. and B. C. and the contents of such petition, the defendant answers, he has not any knowledge or information of the truth or falsehood of the several allegations, charged to have been contained in that petition, without stating what his belief is as to the same. This exception is unfounded. When a defendant answers, that he has not any knowledge or information of a fact charged, he answers sufficiently, and is not bound to declare his belief. He is not to be supposed to have any belief one way or the other. The rule requiring a defendant to state his belief is, when he states a fact upon information or hearsay. But when he has neither knowledge, nor information as to facts stated by the plaintiff, he is not bound to say more. It would be unreasonable to compel a defendant, who knows nothing, and has heard nothing on the subject, *except from the plaintiff's bill*, to declare what his opinion or belief is of the plaintiff's veracity. It is sufficient for him to say, that he does not know, nor has he heard or been informed of the facts charged in the bill, *save by the bill itself*; and that he, thereupon leaves the plaintiff to make proof of these charges as he shall be advised.

The second and third exceptions were in substance the same that the defendant had not set forth according to his knowledge, information or belief, *when* a commission of bankruptcy issued, and *when*, J. J. W. was declared a bankrupt. *What estate*, he then had, and *who were assignees, &c.*

His answer was, he had heard that a commission of bankruptcy was issued in England against J. J. W. and others partners, that two of them were residents in England at the time as he had heard and believed, and as to the time when the said commission issued, or as to the proceedings thereon, further than he had been informed and set forth aforesaid, he was utterly and entirely ignorant.

Beames orders, 179.
Adopted in all the books of practice.
Woods v. Morrell,
1 John. C. C. 107.
(a) In Johns.
"or" is printed for "and."
Cooper's Eq. Plead. 314.
Morris v. Parker,
3 John. C. C. 297.

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The Chancellor said,—The objection is that he does not answer according to his knowledge, information, or belief ; when such a commission issued ; what estate the bankrupt then had ; and to whom assigned. But these exceptions are founded on erroneous deductions.

The defendant does declare all he can or ought to be asked to declare when he says that he is utterly and entirely ignorant of the time when the commission first issued, what estate Waldo had, and when and to whom it was assigned. He avers his absolute ignorance as to these facts and therefore cannot answer them. He is to answer as to what he knows, or has been informed of, when called upon to answer."

In a suit for an account, it is not sufficient for the defendant to answer so far only as will enable the plaintiff to go into the Master's office, as by submitting to account. He must set forth the best account it is in his power to give, averring it to be so.

White v.
Williams,
& Vesey, 193.

" The defendants, trustees of estates conveyed for certain purposes which the plaintiff alleged to be satisfied, were interrogated by the bill as to the total amount of all sums due to and paid by them upon the several particular items. On exceptions, Lord Eldon said,—It is not sufficient for the trustees, to refuse to give information by their answer, further than to enable the plaintiff to go into the Master's office ; and it is not enough that the answer gives a ground for an account in the Master's office. They are bound to give the best account they can by their answer ; referring to books, &c. sufficiently to make them parts of their answer. The court would consider the trustees as giving the information very oppressively, if they were to set forth a schedule with reference to transactions for twenty years together ; but it requires them to refer to books, to give all convenient opportunity of inspection, and to refer to them so as to make them part of their answer, and so as to ascertain, whether that is the best account they can give. The plaintiff has a right to compel them by their answer to say, that is the best answer they can give.

They say they have set forth the totals by leaving the books in the Master's office ; but no person could be enabled by this to find out the totals. They ought to state by their answer that they have set forth the totals in the best manner they can. I give no opinion whether the trustees are bound to state the totals otherwise than thus ; that they have laid the accounts, from which the totals will appear, before the Master ; and that those accounts enable the plaintiffs to learn as much

as they themselves know of them. But to that extent they must pledge themselves,

4th. The remaining point for the Master's judgment is, whether the defendant has not a defence which protects him from answering further than he has done. (a)

This involves the difficult and litigated question, how far a defendant may, by answer, object to answer fully.

The question more extended is, whether a defendant who avers he has a defence, which if proven, will be a complete bar to all discovery and relief, may take such defence in his *answer against discovery*, or must resort to a demurrer or plea. In the case of *Faulder v. Stewart*, Lord Eldon called this a distracted point, and said it would be a painful duty to say, which of the discordant opinions was right.

I have *first* collected every thing I have met with of authority, reasoning, and principle, which tends to establish a general rule upon the subject, without connection with its application to any particular case, together with the decisions upon the nature and extent of any other general rule of the court which possesses an influence upon the point.—Thus from general principles, from reasonings and decisions, an estimation may be formed of the utility and extent of the rule, important in guiding its application to novel or disputed cases.

The *second* head of inquiry is, what are its exceptions ; and an examination, how each case, which the rule has borne upon, stands upon authorities, then becomes important.

In tracing the first part of the subject, cases will occur, in which there is nothing of general reasoning, nothing bearing upon any principle, but the decision itself.

Every case has a double operation, first, as forming a precedent for the determination of another, alike in its circum-

(a) The principal part of the ensuing remarks were written before the case of *Philips v. Prevost*, in which, although the chancellor still treats the *general* rule to be, that the defence cannot be taken by answer, he has admitted a new exception, and evidently is disposed against the rule, and to innovate upon it. I have known two cases of a defence taken by answer upon the strength of that case, which clearly would not have been allowed in England. The one was a release, and the case was compromised before the exceptions were brought before the chancellor.

In a subsequent page, I have examined the case of *Philips and Prevost*, and stated the objections which appear to me to exist against the soundness of the opinion, with the freedom which the decisions of the illustrious founder of our equity system will in general best bear.

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stances; and next, as tending to the creation, support, or qualification, of some general rule. Such cases as are above adverted to, will be shortly noticed as authorities.

It is obvious from the terms of the question, that it relates to a defence against a *discovery*; taking that word largely, as comprising the admission of what is stated by the plaintiff, as well as the disclosure of fresh matter. It may be clearly stated that there is no possible defence to *relief*, which cannot be insisted upon at the hearing, on an answer merely. Now it appears that there are forms of the court peculiarly appropriate to a defence, which objects to a discovery merely.

Forum Romanum, Page 83.

Lord Redesdale, in *Roches v. Morgell*, 2 Sch. & Lef. 721.

Hardress, 130.

Langham and others v. —, Exchequer, 1658.

Hardress, 188. 1661. 13 Car. 2d. Excheq.

Mitford's Plead. 248.

"As demurrers are where no sufficient matter is contained in the bill, to bring the defendant to answer the interrogatories of a bill,—so pleas are the shewing some matter to the court, whereby it appears that the plaintiff ought not to be answered.

"A plea is a special answer to a bill, differing in this from an answer in the common form, as it demands the judgment of the court in the first instance, whether the matter urged in it does not debar the plaintiff from his title to *that answer*, which the bill requires."

The earliest case I have met with in which the point is considered, is in Hardress.

"A bill for tithes of certain houses in London and for a discovery of the improvements of the rents. The defendants set forth a customary payment in lieu of all tithes. An exception was taken, because they did not discover the rents; and the court held, that the *modus* being alleged no otherwise, *than by answer*, they ought likewise to have *set forth* the particulars of the rents, and answers to *all* the parts of the bill. But if the defendants had pleaded it, they need not to have answered to *any other matter*, and so it was ruled."

"In *Randall v. Head*, however, the bill was to discover the number of conies killed, alleging a tithe of the tenth coney by custom, and a denial of the custom without *answering* as to the number killed, and it was held that till the custom *be tried*, the defendants need not discover, and an issue was directed."

The first case in Hardress, — *v. Langhorn and others*, is adopted by Lord Redesdale, and the law stated as to tithes, as there laid down.

These cases shew, that even in the exchequer, the rule of old was at least unsettled.

The earliest case is very decided, that the party could not by answer object to answering fully. Though his objection, if proved, would wholly preclude relief. In that court, how-

ever, the rule is now otherwise settled, as will be shown afterwards.

In Chancery the following cases shew the progress of this question.

“ In *Richardson v. Mitchell*, before Lord King,—The bill was brought to set aside a purchase, and to have a discovery of the profits and sale of an estate. Defendant answered, he was a purchaser, and was not obliged to make a discovery. Exception was taken for not answering and allowed. Select cases in Chan. 51. 1725. Cited also in 2 Eq. Cases, ab. 67.

In support of it the case of *Stephens v. Stephens*, before Lord Macclesfield. Bill for the discovery of the rents and profits of an estate, ~~and~~ therefore till the right is determined, he was not obliged to give an account of the profits. Lord Macclesfield said, this might be good by way of plea, but, having answered, he must answer the charge of the bill. Stephens v. Stephens. *defendant claimed title and insisted*

So lately the case of *Edwards v. Freeman*,—“ Bill for an account, defendant controverted the right and said, he was not obliged to give the account before that was settled, and Lord King was of opinion, that having answered, the charge of the bill must be answered. So resolved here.” Edwards v. Freeman.

In Paxton's case, Lord King said,—“ A man is not obliged to answer any question which may subject him to a penalty. Every thing else material he must.” Select cases in Chan. 53. 1725.

“ In Hornly and Pemberton, the bill was by a partner against his copartner, for a discovery of what goods he had consigned to others. Moseley, Rep. 58. 1728.

The defendant by answer set forth various circumstances, as the protesting of bills drawn by him on the plaintiff, and submitted to the court, whether there were not a determination of the articles of partnership. On exception for insufficiency, the Lord Chancellor allowed it, for this was matter of judgment which the court would determine at the hearing ; and if it was decided for the plaintiff, and defendant should die in the mean time, how is plaintiff to come to a knowledge of these consignments.” King.

These cases appear to justify the assertion of Mr. Abbot in *Cartwright v. Hatley*, that both Lord King and Macclesfield had determined, that a defendant cannot by answer insist, that he is not obliged to answer ; but it must be by plea. Brown. C. C.

Very little is to be found upon this subject in the time of Lord Hardwicke. The case of *Honeywood v. Selwyn*, was one of penalties and disabilities, a clearly ~~accepted~~ case.

It is said by counsel, that Lord Hardwicke in *Gothen v. Gale* declared,—That where the plaintiff's right was not appar- In Sweet's. Young, Ambler, 354. 1767.

ent, but remained in doubt, he was not entitled to a discovery of personal estate of the testator, except in the case of a creditor or legatee of the testator. In that case, there was a devise in tail, and the heir at law filed the bill suggesting that the person who took under the entail was illegitimate, and praying to be declared entitled to the real estate, and that the personal estate might be applied to pay off a mortgage on the real, and an account for the purpose. The defendant the administratrix insisted upon the legitimacy of the party, and refused to give the account, which refusal Lord Hardwicke sustained.

Exchequer
Parker.

"In *Sweet v. Young* the plaintiff complained as next of kin to the testator. The defendant by answer stated, he believed plaintiff was not next of kin, having heard her say so, and refused to account, on exception for not setting out the account. Exception allowed. The Chief Baron said,—If the fact is denied, and lies in the knowledge of the defendant, the plaintiff is not entitled to a discovery of assets. Such was *Gethen and Gale*; but if the fact does not lie in his knowledge, though he denies it, he must set out an account. There is no inconvenience to the defendant in making such a discovery, but may be very great the other way."

The best possible proof of the situation of the law upon this subject, at this period, which was prior to Lord Thurlow's cases, is the treatise of Lord Redesdale.

The second edition of the treatise appeared in 1787. The Dublin edition bears date indeed in 1795, but was not prepared by the author. There is no case cited later than 1786. (page 192 to 212.)

His doctrines may be gathered, from the following quotations.—After stating for what purposes a plaintiff is entitled to a discovery, he says,—“However if the discovery sought is matter of scandal, or will subject the defendant to *any pain, penalty or forfeiture*, he is not bound to *make it*; and may by *answer* insist that he is not obliged to make the discovery, if he does not defend himself by demurrer or plea.” He then proceeds,—“That if the defence is *not proper* for a plea, or it is doubtful, whether as a *plea* it will hold, he may pray by *answer* the same benefit, of so much as goes in bar, as if he had pleaded it; or if the defendant can offer a matter of plea, which would be a complete bar, but has no occasion to *protect himself* from any *discovery* sought, and can offer circumstances not fit for a plea favorable to himself, he may set forth the whole by answer.”

He then instances the case of a purchaser for valuable consideration without fraud or notice, with the circumstance of

Having improved with the knowledge of the plaintiff, and adds,—"it may be more prudent to set out the whole by way of answer, than to rely on the single defence by way of plea, unless it is material to prevent disclosure of any circumstances attending his title. For a defence which, if insisted on by plea, would protect the defendant from a discovery, will not in general do so, if offered by way of answer."

He cites the cases before Lords King and Macclesfield. The result of these remarks, seems to me this, that if a defence against discovering, can be taken by plea, it cannot by answer, with two excepted cases, scandal and subjection to penalties.

Lord Redesdale has published a third edition of the treatise. —In Beames plea in Equity, the following passage is quoted from it.—"The defendant has sometimes been permitted to negative the plaintiff's title by answer, but in other cases this has not been allowed, and the subject seems still to require further consideration."

This remark is made after speaking of a plea negating the plaintiff's title to a discovery.

There is one other position of Lord Redesdale, which requires explanation, as Mr. Cooper has fallen into an important error upon it. In page 312 of his equity pleadings, Mr. Cooper says,—"That the proposition laid down in the books," quoting Mitford's treatise, page 244. "That a defendant may by answer insist upon every ground of defence, that he could use by plea," has lately received considerable qualification; it seeming to be now established, that he can only protect himself from discovery, by demurrer, plea, or disclaimer, but that, if he answers at all, he must answer fully, with two exceptions, tending to criminate, and a purchaser."

Cooper's
Plead. 312.

Adverting to
Dolder v.
Huntingfield,
and other
cases.

Lord Redesdale's language in the passage cited is this.—"If a plea is overruled, the defendant may insist on the same matter by way of answer." Citing 3d P. Wms. 95. 2 Vesey, 492. 1 Atkins, 450. *Harris v. Ingleden*, *Suffolk v. Green*, *Finch v. Finch*.

Page 244.

It is manifest that this passage cannot in its general sense be applied to a defence against discovering. It is preposterous to allege that a defendant may take a defence by plea against discovering, and when it is pronounced insufficient, urge the same defence still against discovering, in a different form. It is therefore against the relief, that the defence may still be urged, and which Lord Redesdale means; and this is permitted because the defence which is insufficient to preclude an answer, may turn out a defence to the relief, or to part of the relief sought.

The construction Mr. Cooper puts upon this passage is palpably inconsistent with the passages quoted from Lord Redesdale above. And there is a direct authority for the distinction I have taken.

Coxes cases,
in Chan. 1st.
224. 1786.

“In *Hoare v. Parker*.—After a plea overruled, the defendant by answer, insisted upon the same matter in bar of a discovery. Lord Chancellor Thurlow asked, whether there were any instances, after a plea overruled, of the same thing being allowed to be insisted upon by answer.” To shew that it might be done, Scott cited *Harris v. Ingleden*, and *Finch v. Finch*, (two of the cases cited above by Lord Redesdale) but his Lordship said,—“those were cases of *bills of relief*, but he knew of no instance of the same being done in *bills of discovery only*.”

1 Vesey,
Junr. 294.

And Mr. Vesey in his note to *Cartwright v. Hatley*, says, “But a defendant, who has answered, will at the hearing have the like benefit of any matter of bar to the relief prayed, as if he had pleaded or demurred.” An examination of the cases cited by Lord Redesdale will shew clearly, that he is to be understood, according to this distinction.

Next come the cases before Lord Thurlow.

2 Bro. C. C.
252. 1787.

In *Cookson v. Ellison*, he said,—“As the defendant had submitted to answer, he could not enter into the question whether a demurrer or plea would have been allowed. The practice of making a witness a party was extremely wrong, and he should have encouraged a demurrer, but that where a party submits to answer, he must answer fully.”

1 Vesey,
Junr. 292.
1791. also
3 Bac. C. C.
238. not so
fully.

In *Cartwright v. Hatley*,—He says, (speaking of the son whose answer was excepted to.) “He cannot be an accounting party to the plaintiff. But this cannot come on by exceptions. If he had pleaded, that he had no concern in the business, but as agent of his father, and consequently was not accountable to the plaintiffs, it might have barred every thing. I cannot, consistently, with general rules upon exceptions treat an answer, as being as *conclusive as a plea*.” He then mentions a case before Lord Bathurst, in which he did some such thing, and adds, —“The propriety of it was much doubted by the bar. It was an extreme case, the party having matter to allege against setting forth very voluminous accounts; and Lord Bathurst took a pretty strong measure upon it. But I do not like to adopt it; for to do so, we must say, that, if there is any part of the answer, which if made out would entitle the party to a decree, he need not answer the rest. I determined this point in this way yesterday upon argument. Where the witness submits to answer he must answer fully.”

In Mr. Belt's edition of Brown, it is added, from a note of Sir J. Saunders, "that the Lord Chancellor said the discovery might be lost, if the party were obliged to wait for the hearing of the cause, whereas if the plaintiff had put the matter shortly in issue by plea, the delay would be trifling."

In *Shephard v. Roberts*, to a bill for an account alleging a partnership,—defendant by answer denied the partnership, stating plaintiff to be a day laborer, and having nothing to do with the business. Lord Thurlow held, that a defendant could not take this defence by answer, but should have plead it. 3 Br. C. C. 239. 1791.

In *Jerrard v. Saunders*, the counsel stated, that Lord Thurlow changed his mind, when this case came again before him, on exceptions to a second answer. In his opinion Lord Loughborough said, that Lord Thurlow had changed the opinion he gave in *Shephard v. Roberts*. 2 Vesey, Jr. 454.

Another case before Lord Thurlow, is *Hall v. Noyes*, in which he said, "supposing the case supplied matter for a demurrer, he could not take notice of the cause of demurrer on exceptions. It might have been cause of demurrer, that Hall having assigned his equity of redemption to Schoole, till he had displaced that estate, had not a right to a discovery." 3 Br. C. C. 483. 1792.

In such case the defendant might have met the plaintiff's title by a plea.—And though he had held on a former occasion, that a negative plea was bad, he believed, he was wrong in holding so, for wherever a plea will reduce the question to one point, it is admissible. All the cases cited were cases, where the title was separate from the account. In that before the Lord Chief Baron, it was completely so:—he could not say, where it was so, the party was ~~obliged~~ to give the account, but in the present case, he thought he was."

The meaning of this expression of Lord Thurlow's I take to be, that where the account or discovery could not tend to the establishment of the title, but was merely the consequence of it when made out, the defence might probably be taken by answer; but if it could aid the title, the discovery must be made. The distinction is clearly expressed in the argument of counsel.

"Though the court will compel an answer as to the title, it will not compel an account, until the title is established."

It is in my apprehension, impossible to reconcile this distinction, with Lord Thurlow's other cases.—In *Cartwright v. Hately*, for instance, no discovery by the son of all the monies received by him, could make him an accounting party to the plaintiff; it could not aid the plaintiff's title to an account. Yet Lord Thurlow held that the defence could not be taken by answer.

In fact it appears to me this distinction gives up the whole ground ; and it cannot be, that a slight passing expression like this, can be opposed to a series of deliberate meditated decisions.

Ibid. note in
Excheq.
1791.

The case alluded to by Lord Thurlow as before the chief Baron was that of *Jacobs v. Goodman*, cited in the argument.

"The bill claimed an account as partner,—Defendant set forth by answer, the nature of the connection, shewing it was not a partnership, and positively denying it. *Eyre* said :—You are not entitled to an account, unless there be a partnership. There may be cases in which the court will require an account, although the principal point in the bill is denied ; but not in a case like this. Suppose to a bill for tithes, the defendant answers, he is no occupier, would not such an answer be sufficient."

4 Bro. C. C.
11. 1791.
Chan.

"In *Selby v. Selby*.—The bill was by a devisee against a defendant, who claimed to be heir at law. Lord commissioner *Eyre* said,—That he should be glad to take advantage of the rule laid down by Lord Thurlow in particular cases, and apply it to all, that wherever the party is not obliged to answer the interrogatories put, he must take advantage of it by demurrer. He stated also,—It was the constant practice of the court of exchequer upon the argument of exceptions, to admit the question to be argued, how far the party was bound to answer the interrogatories put."

See Cooper's
Cases. 212.

In this case the defence was proper ground of demurrer, but I apprehend he meant to extend his remarks to pleas ; and if so, his positions in these two cases are only to be reconciled by the different practice of the courts.

Cited in 11
Vesey, 291.
and in Cooper's
plead. 315. From 11
Vesey, about
1786. the
plea was be-
fore Lord
Thurlow in
1785.

Gun v. Prior.—"Bill by a party claiming as heir at law, a plea that he was not heir at law had been disallowed, (by Lord Thurlow) then an answer was put in insisting plaintiff was not heir at law, upon exceptions, Lord *Kenyon* sitting for Lord Thurlow, held, that if plaintiff was the heir, he was entitled to the discovery. If not heir, he was not entitled to any, and this preliminary fact must be ascertained. An issue was directed, upon this principle, that if an allegation is made by the defendant of a material fact, *destroying the plaintiff's title*, whether it is by way of plea or answer is immaterial. In either case that must first be decided."

Cooper, 315.

It should be carefully noticed, that Mr. Cooper has fallen into an error in stating this decision to have been made by Lord Thurlow. The case on the plea, was determined by him, and will afterwards be noticed.

2 Br. C. C.
312. 1788.

"In *Newman v. Godfrey*, the plaintiff calling for an account of monies and bills received, defendant by his answer

denied his reception of any, or having any interest in them, with other circumstances shewing he was a mere witness. Lord Kenyon said,—that the defendant having sworn that he was not a creditor, nor had received any of the money, was reduced to a mere witness. It was a principle that a mere witness should not be made a party to a bill, whatever other claims he might appear to have from the answer, he had disclaimed all title. The exceptions for not answering the residue of the bill were over-ruled."

"*Gerrard v. Saunders*.—The answer had distinctly denied all the circumstances charged, from which notice of the plaintiff's title could be inferred, insisted that a defendant was a purchaser for valuable consideration, without notice; and refused to answer further. ^{2 Vesey, Jun. 454. 1794.}

Lord Loughborough said,—The only cases which embarrassed him were *Cookson v. Ellison*, and *Shephard v. Roberts*. That *Cookson v. Ellison*, was clearly mistaken. The last was rightly reported, but it appeared, Lord Thurlow changed his opinion. He then proceeds to argue the case upon the principle of the great protection given by equity to a purchaser without notice and held the answer sufficient."

Mr. Vesey in a note to *Cartwright v. Hatley*, says,—“It seems clear that no defence in bar of the discovery sought, can be alleged by answer, but ought to be by demurrer, if the want of title is apparent on the bill, otherwise by plea.”—Then states the exception of a penalty or forfeiture: And afterwards in a note to *Jerrard v. Saunders*, says,—“that case forms another exception.” ^{1 Vesey, Jun. 299. n. (e) 1791.}

Marquis Donnegal v. Stewart.—“The bill was for an account, of the price of pictures; charging that the defendant purchased them on commission, and by false statements obtained securities, &c. from the plaintiff. The answer stated, that the pictures were bought in course of trade, defendant being a dealer; and denied any dealing upon commission, refused to account. Earl of Rosslyn said,—The answer positively denies the species of dealing which would entitle you to an account of the real cost of the pictures. Till you establish that, I should think it very dangerous.” Answer held sufficient. ^{3 Vesey, Jun. 446. 1797.}

Phillips v. Carey.—“Bill against an administrator for an account, plaintiff claiming as a creditor. Answer denied, that there was a balance of account against testator's estate, and refused the account. On exceptions, the answer was ruled sufficient.” There is no reason given for the decision. ^{4 Vesey, 107. 1798. Earl Rosslyn.}

Lord Eldon has said much upon this subject, although the point has unfortunately never been so brought before him, that

it could receive the satisfactory decision which his talents and learning would ensure.

11 Vesey,
283. 1805.

In *Dolder v. Lord Huntingfield*. He says,—“cases in modern times have said, that if a defendant *denies* some substantive fact, which if admitted, would give relief, until the truth of that fact is disposed of, no farther answer shall be compelled. Many topics of great weight must be disposed of, when that comes to be decided, if it is still open. The court has got to a species of pleading which is neither a plea, answer, or demurrer, but a little of each. The consequence is, that the commission must go to a number of facts, instead of one, as in case of a plea. The late cases, as far as they are authorities, (as to which I say nothing now) establish this, that if the bill is both by the plaintiff and defendant allowed to give a right to the relief, if true, the defendant not demurring, nor denying by answer the title to relief upon the bill, but negating one fact positively, says, the court if they will take that fact not to be true, ought not to call for an answer.” The point decided in this case will be hereafter noticed.

11 Vesey,
296. 1805.

Faulder v. Stewart.—Adverting in this case to the question, he says.—“It will be a very painful and difficult duty, when the court is called to it, to say, which of the various and discordant opinions, expressed by Lord Thurlow, Lord Kenyon, Lord Rosslyn, and Chief Justice Eyre is right.” And after stating the ground of his decision, viz. that there was nothing positively averred in the answer, but it was all argumentative, and if the matter had been pleaded in those terms, it must have been overruled, he proceeds,—This is without prejudice so the decision to be made, when it shall be necessary on this point, for upon some of the authorities, it will be very difficult to say, that nothing can be pleaded in this court but some fact *dehors* the bill. I think a plea has been permitted of some facts, which were only a negative of some circumstances stated by the bill.”

11 Vesey,
303. 1805.

Shaw v. Ching.—The answer, he said, did not involve the general point: he considers the rule however much at large. “A case of partnership is stated, praying a great variety of accounts, and stating several circumstances of fact. The defendant does not put in a short answer, or try the effect of a plea of no partnership; but puts in an answer stating, that there is no partnership; refusing to answer what is inconvenient for him to answer, but answering all that is convenient. When a party demurs, judgment is had in the first instance. So upon a plea; but if this sort of illegitimate pleading, can be substituted, the suitor is thus involved.—1st. He is put to the expence of the judgment of *the Master*, and the Master is call-

ed upon to give judgment in a matter, which with the *exception* of the case of pain, penalty, and forfeiture, it is not the habit of the court, to intrust him. 2d. If the defendant by plea, puts in a single fact, or several facts, constituting one defence, they go to issue upon that; if it is found for the defendant, the plaintiff is dismissed, if for the plaintiff, farther inquiry is directed. But in this way, the defendant answering just what he chooses, issue cannot be joined upon the single fact supposed to be the bar; but the plaintiff if he replies, must reply to the answer as he finds it, and must go to long expensive proofs upon a variety of facts, which is a vexatious burthen thrown upon him. Lord Thurlow seems to have thought, that if the defendant answers, he shall answer throughout. Whether that is right or not, I am convinced the forms of pleading cannot stand as they now are upon the reported cases."

Taylor v. Milner, during the same year was decided by the Master of the Rolls, Sir William Grant. 11 Vesey, 42.
1805.

The case first came before Lord Eldon on a motion to expunge a demurrer. 10 Ves. 444. "The bill stated a marriage agreement, and a memorandum of a settlement made between the plaintiff, and a ward of Milner, through the procurement of Milner; that the marriage was broken off by Milner in collusion with Wheeler, to induce the plaintiff to marry another woman, who was indebted to Wheeler; and prayed a discovery to enable the plaintiff to bring an action at law. Wheeler after obtaining two orders *for further time to answer*, filed an answer and demurrer. On the motion to expunge the demurrer, it was urged, that after an order for time to answer, nothing but a plea or answer could be put in. It precluded a demurrer; and upon this rule fully recognized by Lord Eldon, the motion was granted. On that argument, counsel said,—This is a demurrer to so much of the bill, as seeks to subject this defendant to something so much *in the nature of a penalty*, that this court will not compel him to answer; and Lord Eldon said,—Certainly there was important matter on the record.

The case then came before the Master of the Rolls, on a motion for the production of letters mentioned in a schedule to the answer. This was resisted on the same ground taken on the motion respecting the demurrer. Sir William Grant said,—If the question now were whether the defendant should answer at all, the objection would deserve great consideration. But it is now too late to argue, whether upon this case, the plaintiff is entitled to a discovery or not; for there is no difference, whether the court has determined, that the bill is such as the defendant must answer, or whether the defendant has by his own conduct precluded himself from raising that

question. It is now determined, that the defendant *must answer*. That he must answer fully is a necessary consequence. I take it to have been determined, that if a mere witness submits to answer, he must answer fully. He then proceeds to state, that the case differs in principle from those of a total denial of title; where the defendant has not been compelled to give that discovery, which was merely consequential; (upon a title established.) Here plaintiff comes for a discovery of facts, which he says, would lay the foundation of an action at law. It was therefore to aid the title, that the discovery was sought." It is on this distinction, that the case probably rests as a decision. But certainly the previous general remarks quoted above, go much farther, and it seems as if the Master of the Rolls took this ground to avoid a positive contradiction of some of the authorities.

It may also admit of doubt, whether as a decision, this case is perfectly defensible. The defence was stated to be, something in the nature of a penalty. If it had been such, the defendant was entitled to urge it by his answer, and it appears to me, that the consideration of the point, whether it amounted to a penalty or not, was his right. Lord Eldon upon the motion respecting the demurrer, said,—“The defendant might still have advantage of his demurrer by his answer.

15 Vesey,
372. 1808.

Rowe v. Teed.—Here the point was again commented upon by Lord Eldon.—He stated the question to be, whether the answer brought forward one *short fact*, or such a series of circumstances establishing in the result *one fact*, that would be an answer to the prayer of relief and discovery; and therefore whether this was a case in which the court would decide the litigated point, to what extent a defendant is bound to answer, who has averred a circumstance, which if truly averred in another form and sufficiently proved, would be an answer to the whole prayer of discovery and relief. He then observed,—I repeat that I should not shrink from the decision of that question, if it was fairly before me. It is not my purpose to repeat all that is to be found upon this subject in the late cases. But I must repeat, that whenever the question comes to decision, it will be infinitely better to decide, that in this court the objection should be made by plea, rather than by answer.

In the court of exchequer, exceptions come before the court, in the first instance. That is not the case here. An answer *prima facie*, admits that the defendant cannot plead; and with the exception of the cases in which it is admitted as general law, that the party is not to answer a particular circumstance, as that he is not to criminate himself, the case of a purchaser

for a valuable consideration, &c. this court does not trust the Master generally with the determination, how much of the answer, considered as a plea, would be a *good defence*. The Master therefore is almost under the necessity of admitting the exception; and when the propriety of his judgment comes to be argued here, it would be most incongruous, that the court, admitting his judgment not to be wrong, should yet give a different judgment, treating the *answer as a plea*.

Another circumstance deserving attention is the great difference of expence in bringing forward the objection by plea, rather than by answer. And lastly he observed, that the practice of the court required, that the bill and answer should form a record, upon which a complete decree might be made at the hearing."

Somerville v. Mackay.—Lord Eldon said,—“ This is not a demurrer, as far as the bill seeks an account of these facts, but an answer, making a *partial discovery*, and *refusing* the rest, and it recalls to my mind the inconvenience which struck me forcibly in some former cases. The old rule before the time of Lord Thurlow, was to either *demur*, to plead upon something *dehors* the bill, or that sort of *negative plea*, of which we know more in equity than at law, or to answer throughout. The inconvenience of this new mode of pleading is, that the defence is not judged of by the court, in the first instance; but it goes to the Master, first upon exceptions to the answer, then to the court upon exceptions to the report. The whole process being gone through, under which formerly the defendant was understood as admitting, that he had no *such short answer* to state as would entitle him to a declaration in the first instance, whether he ought to make any further answer.”

The case did not bring up the general question, so that it could be decided. The answer was held insufficient, on the ground that it was very doubtful at least, by his own shewing, whether the defendant *had the defence* in some respects, and certain that he had it not in others; and the answer did not aver it positively.

Agar v. The Regents Canal Company.—The Master stated by his report, that he had allowed certain specified exceptions to the defendant's answer, some of which he had allowed, because it appeared to him, that the defendants had made a *discovery in part*, and he conceived, that according to the rules of the court, they were bound to make a full disclosure.

The Vice Chancellor said,—That upon the rule as to a defendant's answering in part, the Master was right. There was no instance of a defendant being permitted to select such

16 Vesey,
382. 1810.

Cooper's Ca-
ses, 212.
1815.

Sir J. Plum-
et.

part of a question as he chooses to answer, and refuse the rest if material." "The bill in this case set up a title to certain mines possessed by the defendant, and prayed an account of the profits, of the quantity of ore taken out, prices, &c.

Norway v.
Rowe. 1
Merivale, 136.

The defendant by answer denied the plaintiff's title; stating how he had forfeited it; and declined setting out the accounts.

On exceptions the court directed them to be set out.

Ibid. 351.

The accounts were so improperly set out as to be referred for impertinence, and Sir S. Romilly upon the discussion of the report of the impertinence stated, that in a former stage of these proceedings, when the answer had been excepted to, for insufficiency, and reported *sufficient*, the Vice Chancellor allowed the exception to the Master's Report, on the cases of *Dolden v. Huntingfield*, *Faulder v. Stewart*, and others, in which the question, how far a defendant can by answer refuse to answer fully, had been of late so much agitated. His Honor thought, that with reference to what had fallen from the court, in these instances, he was obliged to consider the former answer of the defendant declining to set out the accounts insufficient."

Sir John
Leach.

The present Vice Chancellor of England has adopted the rule, that a defendant cannot defend himself from answering by answer, in its utmost latitude.

3 Mad. Rep.
66.

In *Mazzareddo v. Maitland*, he says,—“The answer to the original bill was good in substance, though not in form, because a defendant cannot by answer object to answer, though by plea, he may.—That point was much considered in *Somerville v. Mackay*. It is not expressly decided there, but I remember during the argument, the Lord Chancellor strongly expressed his opinion, that a defendant could not answer as to a part of a bill, and refuse to answer the rest, and I think it so useful a rule, that I shall always adhere to it.” The reporter, says in a note,—“In various subsequent cases, His Honor reiterated this doctrine.”

— v.
Harrison, 4
Mad. Rep.
252.

“On a bill for an account of partnership transactions, the defendant by answer denied the partnership, and refused to set out the account. Exceptions were allowed. The Vice Chancellor saying, he should have pleaded.”

3 Mad. Rep.
432.

“In *Unsworth v. Woodcock* also, the motion was for the production of books, &c. mentioned in the answer. It was opposed on the ground that though the defendant answering at all was bound to answer fully, yet if he insists that the plaintiff is not entitled to the account he seeks, the court will not compel him to produce books, &c. until the plaintiff has estab-

lished his title. The Vice Chancellor said,—I can make no such distinction. The plaintiff might compel the defendant to set out the contents of the books in his answer, and the production of the books is a part of the discovery which the defendant, submitting to answer, submits to make.”

“The bill prayed a certain deed might be set aside as fraudulent, and for an account as one of the next of kin of William Leonard deceased. The defendant answered, and to the part seeking an account relied upon a deed of compromise as a bar.—On exceptions, Lord Chancellor said,—No question was so unsettled as this,—Lord Thurlow was of opinion, that a party should in all cases put in a full answer, except where he is called upon to criminate himself, or defends himself as purchaser for valuable consideration.—That Lord Eldon was of opinion, this defence could not be relied on by way of answer. There is scarcely an instance, where the defendant pleads, but he must also answer; it was the best and least circuitous mode of proceeding.

In answer to the argument, used that the party might be examined upon interrogatories in the Master's office after the right was established, the Chancellor said, the party might die before he goes into the Master's office, or he may by the answers render such an account, as will satisfy the plaintiff. The answer was held insufficient.”

“In *Stratford v. Hogan*, he held, that the case of an attorney called upon to reveal secrets of his client was an exception to the general rule.” It is the client's privilege.

Such is the state of the authorities upon this subject in England.—In our own state, Chancellor Kent in the *Methodist Church v. Jaques*, adverted to the question, considering the general rule to be that the defence could not be taken by answer, and in *Philips v. Prevost* entered upon it at large.

“The case of *Philips v. Prevost* was this.—A judgment had been obtained against I. Croghan in 1779, by Joseph Simon on a bond given ~~by him~~. The executors of the creditor filed the bill thirty six years after the accruing of the debt, for a discovery of lands descended; an account, and sale of the lands. There was nothing in the bill to account for, or explain the delay.

The defendant by answer refused to set forth an account or make a discovery insisting upon the staleness of the demand, and that the debt should be presumed satisfied. On exceptions the Chancellor held the answer sufficient.

In the first place was not this a proper case for a demurrer? The Chancellor himself says,—“The objection is founded upon

matter appearing upon the face of the bill, and from which it is insisted the discovery would be useless, as the plaintiffs have no subsisting valid demand."

But in another passage he observes, "that the defendant had no other way to raise the objection in pleading, but by answer; and this consideration had great weight in favor of the sufficiency of the answer—that he *could not have demurred* to the bill, for this would be depriving the plaintiff of the opportunity of accounting for the loss of time."

See *Kemp v. Pryor*, 7 Ves. Jr. 245.

With respect, can this position possibly be correct? I presume nothing is better settled, than that the defendant has an absolute right to call upon the court, to say that under the bill as shaped, if proven, some relief can be given, or else to dismiss it. Would the court listen to a suggestion, that the bill should be retained, because there was a possibility that by amendment, the force of the defence would be taken away, and relief might be given? again could not the plaintiff have accounted for the lapse of time by amending his bill after the demurrer, which can be done on special application any time before the demurrer is allowed?

Rule 18.

There cannot now remain a doubt (whatever may have been the case formerly) that a demurrer lies upon the ground of lapse of time. See *Hoveden v. Lord Annesly*, 2 Sch. and Lefroy, 637, and Mr. Belt's note to *Deloraine v. Browne*, 3 Br. C. C. 632. *Foster v. Hodgson*, 19 Vesey, 180. *Sherington v. Smith*, 2 Br. P. C. 62. *Beckford v. Close*, cited 4 Vesey, 476. *Contra Deloraine v. Browne*, 3 Br. C. C. 632. and *Gregor v. Molesworth*, 2 Vesey, Sen. 109.

3 Atk. 276.

The Chancellor also cites Lord Hardwicke's observation, in *Honeywood v. Selwyn*, that the defendant who had insisted he was not bound to make a discovery which would subject him to statute disabilities, was right in objecting by answer; that he could not have demurred, for that *would have admitted the facts* charged to be true. But it appears to me, there must be some error in this position.

16 Vesey, 64.

In *Lloyd v. Passingham*.—The bill represented certain parish entries to have been forgeries of Robert Passingham. He demurred to so much of the bill as sought a discovery of these facts. Lord Eldon said,—I protest strongly against the doctrine; that Robert Passingham, having demurred to so much of the bill as seeks a discovery of facts which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill; having observed a notion prevailed lately, that a witness who refuses to answer a question upon that ground, is therefore not to be

believed. Nothing can be more fallacious as a standard of credit, than such a conclusion ; or more dangerous to justice by robbing the subject of that protection, to which he is entitled by law ; and the practice formerly was, that the judge told the witness, he was not bound to answer the question." Again he says,—With regard to the answer of the other defendant, he, being charged as a party in these imputed forgeries, demurs to so much of the bill as seeks a discovery of participation in them,—and it is contended, that as he has so demurred, this court may therefore assume, that the forgeries existed. Upon that point, (if in any other place it is to be so taken) I cannot in a court of justice hold, that a party demurring to answer a criminal charge, that is to be taken as an admission." It will appear from *Mitford's* pleadings, that demurrers upon this, or similar grounds, are of general use.

Assuming then that a demurrer would lie in the case of *Philips v. Prevost*, it appears to me a striking instance to shew the utility of the rule in question. If the solicitor had been compelled by the rule of the court to take his defence by demurrer, it would have been argued the term after filing, if the plaintiff had not amended his bill, by statements (as of admissions or payments) to repel the defence. If allowed, there would have been an end of the cause, with an expedition and cheapness far greater than by the course by answer. It should be remembered, that the reasoning against the English rule, as now understood, goes upon the supposition, that the defence will turn out valid and sufficient. It will be instantly admitted, that upon the supposition of the defence appearing invalid, it is better to compel the full answer, if for no other reason, yet because there is some risk of the discovery not being procured, or not so completely, from the death of parties. Then that rule clearly is best, which will tend soonest and most economically to settle the question of right.

It is in this point of view, that the rule in question is of such utility, as to draw forth the very strong expression of Lord Eldon, that it would be *infinitely* better to adopt it. It is a rule of prevention ; by compelling parties to assert their defence in the speediest and cheapest form, or else subjecting them to trouble and difficulty. Not that the rule may not occasionally be the cause of inconvenience, but that upon the whole it is calculated to prevent delay and expense to a great degree.

A defendant in his answer does not usually state a leading fact merely, but sets forth all the numerous collateral matters, which he deems important to prove in his cause. Then the

plaintiff must meet them, and thus as Lord Eldon says, the commission goes to many facts, instead of one; that is, testimony will be entered into upon all those points considered important. If he does not go into such matters of defence, but alleges and relies upon one distinct fact, his answer becomes in effect a plea. Why not then call it so?—If for no other reason, for the sake of precision of language, and to meet recognized distinctions. But in truth a stronger reason exists. If filed as an answer, it is subject to the delay of exceptions. If as a plea, it is at once set down for argument, or issue taken upon it.

It is impossible to have a comprehensive and just understanding of this subject without entering somewhat into the consideration of a plea in equity. It will be remembered that Lord Eldon treats the general point as somewhat dependant upon the question, whether a negative plea is good. The manner in which that question affects it is this.

In *Faulder v. Stewart*.

See Lord Eldon's statement.
16 Vesey, 264. and post.
29. *James v. Davis*.

Lord Thurlow had once decided, and on two or three occasions affirmed, that a negative plea was bad; and indeed the common definition of a plea comprises the quality of its being of matter not contained in the bills, or technically called, *dehors the bill*.

A defence which consisted in a denial of the title, under and by force of which the plaintiff claimed, was clearly a direct negation of a fact stated in the bill. As if plaintiff stated himself to be heir or partner, a defence that he was not entitled to the character assumed, was a mere negative.

Then it necessarily results, that if a defendant is precluded from taking this defence by plea, he ought to be allowed to do it by answer.

Published in 1818:

In *The Elements of a Plea in Equity*, by Mr. Beames, the author enters at large into these points, and it appears to be part of his object to reconcile the admission of negative pleading, with the general definition of a plea, and received notion respecting it.

He attempts to reach this object through the following propositions.

Orders in Chan. Ed. Beames. 26.

1st. That the definition usually given of a plea, laid down by Lord Bacon, and sanctioned by Lord Redesdale, comprising the quality of its being of matter *dehors the bill*, is the proper definition of a pure plea in equity. Page 1st to 6th.—6th, particularly.

2d. That a substantial division of all pleas in equity, may be made into pleas in abatement, and pleas in bar,—that the former question the *propriety of the particular remedy* or

any right in the *party suing*, but tacitly *concede the existence of a cause of suit*; the latter dispute the very *cause of suit itself*. Page 58, 9. 56 to 62. 135. 156. In the discussion of every species of plea, he tests its character, as being in *abatement*, or in *bar*, by the above distinction.

3d. That generally, pleas in bar are of matter *dehors the bill*.—They are then *pure pleas in bar*. That there is an incongruous species of pleading, not strictly to be called a plea, which is in bar, and not of such matter; such as a plea of a release to a bill seeking to set it aside. That if this is to be termed a plea, it is an exception—that the plea of a purchase for valuable consideration without notice, is perhaps another exception in some measure.⁽¹⁾

Compare pages 9. 60 to 62. Note 1 page. 9. and see Cooper's pleadings. 237.

The above positions are warranted by, and indeed principally derived from Lord Eldon's remarks in *Bayley v. Adams*, who gives the definition of a plea in bar as of foreign matter, stating that, it *admitted the bill*, pro hac vice, and *interposed* matter, which if true, destroyed it; and notices the exceptions to be, where certain averments seem to have been required both by plea and answer. Such are cases of an averment by plea of no fraud in a decree or release, impeached on the ground of fraud by the bill.

6 Vesey, 584.

4th. That pleas in abatement may be indiscriminately of matter *dehors the bill*, or a negation of facts stated in it, for instance, that a plea to the jurisdiction may be considered as of foreign matter. It denies indeed the proposition, expressly or impliedly assumed in every bill, that the court *has jurisdiction*; but it does so through an affirmation of a fact, that some *other court* has the right alone to consider the subject. Many pleas to the person are of the same character; denying the proposition assumed impliedly by the bill, viz. that the plaintiff is in a situation which entitles him to sue, but denying it through the assertion of some fact, making a disability, as outlawry, excommunication, or the existence of a person, as whose administrator, the plaintiff claims. On the other side, that a naked plea of not

Page 120 to 129.

(1). This is taken from what fell from Lord Eldon in *Shaw v. Ching*.—Speaking of the admissibility of a negative plea, he says,—“The case of a purchase for valuable consideration comes near this.” But, although this plea must by averment, deny generally the notice or fraud, even when by answer the defendant answers the special circumstances charged, yet this denial seems only auxiliary to the *dehors matter* alleged, of a purchase for valuable consideration. And I think that this allegation ought to be considered *dehors*, notwithstanding that the purchase may have been stated by way of pretence in the bill.

11 Vesey, 305.

Newman v. Wallis, 2 B. C. C. 144.

administrator, not heir, to a bill claiming in those respective characters, is a pure and direct negative plea, in abatement.

Page 124, to 129. 5th. That a negative *plea*, is a *plea to the person, denying the character in which the plaintiff sues.*—"It is true that species of pleading, which is peculiarly termed a negative *plea*, denies the peculiar *character* of the plaintiff." And his title of a section, is—"of pleas of not assumed character or negative pleas."

Page 9.
"120.
124 to 129.

6th. That such a plea is good, as well upon authorities, as they now stand, as analogy to law, and principles of justice, and he quotes a very strong passage from Lord Redesdale's third edition sanctioning such a plea.

Mit. Tr. 188.
3 Ed.

Page 115.
120.

7th. That such a plea, viz. a *negative plea* is a plea in *abatement*, because it merely denies that the plaintiff has a right to institute the suit; not that ~~the~~ *such right exists*, as is the *subject of the suit*. By this series of propositions, Mr Beames supports the admission of negative pleas, and reconciles their allowance with the characteristic of a pure plea in equity, as being of foreign matter; and by this he supports, with some qualification, Lord Thurlow's deliberate description of the different pleas,—"*A plea in bar is collateral to the bill; a plea in abatement is a traverse; you never traverse in a plea in bar.*"

By confining the expressions relating to pleas in bar, to *pure pleas*; and limiting those as to pleas in abatements, that *they may traverse*, the description becomes correct according to Mr. Beames.

But it appears to me, that a series of late cases upon negative pleas, materially affect one of the most important of these positions.

It may be useful to review the progress of the doctrine of negative pleading.

1 Vernon,
473. Winn v.
Fletcher.

"Plaintiff entitled himself as administrator—defendant plead he was not administrator. It was allowed, and Mr. Vernon says,—*it is a good plea in abatement.*"

Of Pleas.
Prac. Reg.
326.

"In respect of the person, it may be shewn plaintiff is not such a person as alleged, as *feme sole heir, administrator.*"

Mit. Tr. 188.
2 Ed.

"A plea that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, though a *negative plea*, is good in abatement of the suit."

Gun v. Prior,
reported
2 Dick. 656.
Forest's Reports, 88. n.
and in Cox's
cases, 1st.

"Plea of not heir, in *bar of the suit*. Lord Thurlow said, —The plea would not be good as a *plea in bar*, though it might as a *plea in abatement*. If that had been the only objection, he would have given the defendant an opportunity of amendment;—But he had great doubts, whether it was a case

analogous to that of an administrator. He doubted whether it would be good in any shape." The case went on other grounds.

"In *Newman v. Wallis*, the plea of not heir was pleaded in bar. Lord Thurlow said,—This plea if any thing, is a plea in abatement. The question singly is, whether the court will admit a traverse of the plaintiff's title as heir, as a plea in abatement to the bill, or whether the equity of the court entitles you to a discovery of all the defendant knows of the title."

On over-ruling the plea, he said, on a motion to amend, "that it was impossible to form the plea so as to save an account."

I apprehend, that this case is a correct decision upon one of the reasons given by Lord Thurlow; but it is true, that he argues against the admission of a plea of not heir at all; one of his questions to the bar being,—“Whether you can plead that the plaintiff is not heir, as a disability.”

This doctrine is all that he intends to retract in *Hall v. Noyes*. His words are,—“Though I have held on a former occasion, that a negative plea is bad, I believe I was wrong in holding so, for wherever the plea will reduce the question to one point, it is admissible.”

Mr. Cooper treats a negative plea, as a plea to the person, and in abatement, or in the nature of such.

The case of *Brew v. Brew*, is decisive upon this, if it were questionable before. The Vice Chancellor said,—“This bill calls for an account of partnership transactions. The defendant, by this plea, denying the partnership, destroys the whole foundation of the relief and discovery prayed. All the late disputed cases upon the point, whether a defendant can by answer, refuse a full answer, admit, that the correct mode of resisting the claim of an account, is a plea denying the relation in which it is called for.”

As in the instance put of an individual setting up a claim as a partner in Child's shop, and in that character, requiring an account of all their affairs. The objection to it as a negative plea must depend upon the nature of the suit. The claim as heir, executor, or partner, can be met only by a negative plea, if the defendant mean to deny the plaintiff's right to that character.”

Thus distinctly is the question of negative pleadings settled so far as such pleas relate to the character of the plaintiff, which he must possess to sue. The cases before spoken of as impairing Mr. Beames' distinction, and enlarging the subjects proper for negative pleas are the following.—Before these decisions I conceive there was no case of a pure negative plea

187. best in the last. The Reports differ materially in the language used by Lord Thurlow.

Post. 2 B. C. C. 143.

3 Br. C. C. 489.

Eq. Pl. 243. 249.

2 Vesey & Bea. 159. 1813.

In *Jacobs v. Goodman*.

which was not a plea to the person, and thus, according to Mr. Beame's plea in abatement. But, those now to be cited were mere negations of facts in the bill, and were perfect pleas in bar.

2 Vesey &
Beames, 260.
1813.
Chamberlain
v. Agar.

"The bill stated that the complainant was housekeeper of W. Agar, who had promised to reward her by giving her an annuity for life. That on his death bed, in presence of the defendants, he told complainant he had made her comfortable for life, and had directed his executors to pay her £200 for life. The defendants came out of the room (she having previously left it) one of them having in his hand a paper; and being asked by complainant if it was his father's will, answered—"No—it is a letter, not to be opened till his death, but it contains what will make you comfortable for life." On opening the will, there was no provision for complainant, and defendants said, the testator had directed them to pay her an annuity for life; alleging it to be £100 instead of the £200, promised. It then charged that the defendants paid the £100 for several years, and that the testator made a *codicil* or paper in the nature of a *codicil*, giving her £200 per annum, which the defendants had not proved, and prayed that they might bring it into the ecclesiastical court to be proved, an account, and investment to answer future payments.

The plea to the discovery and relief was, that the testator did not make or write a *codicil* to his will, or paper in the nature of a *codicil*, bequeathing to the plaintiff, &c.

The Vice Chancellor.—The whole object of this, which is a *negative plea*, is to negative the existence of a *will, codicil, or paper*, by which any annuity or legacy is given. It is said this does not comprehend the whole object of the bill. He then repeats the statements of the bill, as to the testator's promise,—adoption of it by defendants, correction of amount, and payment for years. Does not all this require an answer? Has not the plaintiff a right to a discovery as to the letter? The plea merely negating one part of the bill, and totally silent as to all the circumstances, even regarding that paper on which it tenders an issue, and all the other circumstances, which may entitle the plaintiff to relief, is not the answer the plaintiff is entitled to. Overruled."

16 Ves. 262.
1809.

"*Jones v. Davis.*—The bill prayed an account of stones taken from the plaintiff's quarry, by the Bristol Dock Company, of which the defendant Davis was treasurer. The bill alleged an agreement on the part of the company to keep an account of the stones taken, and that such account had been regularly kept.

The defendant pleaded,—That neither the company, the defendant, nor any agent had ever made an agreement, that an account should be kept of the stones taken; and pleaded the same in bar.

It was urged, that this was a case exclusively for a court of law, except upon the agreement to keep an account; and that was expressly negatived by the plea.

Lord Eldon.—The original opinion of Lord Thurlow was, that a negative plea was bad, and there ought to be an affirmative plea, stating who was heir. His Lordship changed his opinion afterwards, on the ground, that the defendant, though he could prove, that the plaintiff was not heir, might not be able to prove who was the heir.

In this case my opinion is, that the plea is bad; *since it does not contain a negation of the alleged accounts having been kept by the company.* If the accounts had been kept, it would have been evidence to a jury of the agreement, and therefore it is not sufficient for the defendant to deny the agreement having been entered into."

The subject matter of the bill was, the agreement to keep an account of the stone taken, and an account kept in pursuance. But for this, the plaintiff must have depended upon his legal remedy, proving the quantity taken at a fixed price, or upon a *quantum valebant*. It is plain, that if the plea had denied also the keeping of the accounts, Lord Eldon would have allowed it, and had that been the case, it would have precluded any person whatever, not merely the plaintiff, from having a right, in that court, or in any other court, or in any other form, to the discovery, made the subject of the bill, that is an account of the stones; and hence, would have been an absolute plea in bar.

"*Armitage v. Wadsworth*.—Bill stated that *J. Armitage* died, leaving the plaintiff his heir at law, and intestate; that the defendants, under an alleged will, entered into possession of the estates, received the rents and profits, and had obtained the title deeds; then stated that such will was never signed, or if signed, was obtained by fraud, then charged that all the estates having been let by *J. Armitage*, on unexpired leases, no action of ejectment could be maintained by the plaintiff against the tenants; and therefore he could not proceed at law; prayed a discovery, an issue *devisavit vel non*, or that plaintiff might proceed in ejectment.—Injunction, &c. defendants pleaded, that *J. Armitage* was seized in fee of all the estates, and averred, that none of the said estates were or was let on lease by said *J. Armitage* to any person, for any term of years unexpired at his death, all which matters, &c. &c.

1 Mad. Rep.
189.
1815.

It was urged, that this was an ejectment bill—the only ground of application to equity being the suggestion of outstanding leases, which prevents the proceeding at law, and this was expressly negatived.

Sir. Ths.
Plumer.

The Vice Chancellor.—The bill would have been unquestionably demurrable, if it had not stated that there were outstanding leases. Upon that averment the plaintiff's equity depends. Is then a plea, negating that averment, good? It is a point of some novelty.—It is no good objection to the plea, that it is a negative plea.

Lord Thurlow expressed an opinion against a negative plea, but afterwards retracted it; and lately in *Hitchins v. Lander*, the present Lord Chancellor held such a plea to be good.

The right to stand in a court of equity is here reduced to one single point, and that equity is denied.

The bill would have been demurrable, but for the statement of outstanding leases; and as the plea negatives the existence of such leases, it is good: nor does it stand in need of any averment by answer.—Plea allowed."

Here also the plea goes to destroy any right of discovery whatever, in any person whatever, and is therefore in bar.

Cooper's Cases, 34. 1807.

"*Hitchins v. Lander*.—The bill stated, that the defendant having a claim to an estate, then depending in Chancery, made a lease to the plaintiff; that he had given notice since to the tenants not to pay the rent to plaintiff. It prayed a discovery of the lease and notice, and that defendant might redeem a mortgage on the premises, made to James Halse, or procure an assignment of it to plaintiff, and account for the rents and profits.

32 Hen. 8. C.
9. Sec. 2.

The defendants pleaded first, the statute against selling pretended titles, where the grantor was not in possession, and the forfeiture they would be subject to under it. And to such part of the bill as seeks a decree to compel the defendant to redeem the mortgage supposed to have been made to James Halse, they plead and aver thereto, that no part of the said premises ever was, nor is now, subject to any mortgage thereof, made by the defendants to said James Halse."

As to this part of the plea,—It was urged it was good, though a negative plea, and on the other side, it was argued, that a negative plea was not permitted in this court.

Lord Eldon, (after consideration) thought the plea was good, and allowed the same."

These cases therefore impair the accuracy of Mr. Beames distinction and admit a class of decisions in which a negative plea is not a plea in abatement, but in *bar*, and in which a plea

in bar may be a *traverse*. If they are sufficient to establish the position, that wherever there is a single point in the cause, on which the prayer of relief and discovery depends, a plea bringing in issue that point is good, whether it is of foreign matter introduced by the plea, or a direct negation merely of a fact alleged in the bill, then a rule is obtained of great moment and influence, upon the subject now considered. So far as the point consists of the allegation of a certain character, by virtue of which the plaintiff sues, it may be brought before the court by a mere negation of that character, by plea.

Before proceeding to consider particularly the various cases, in which this rule has been applied, it is proper to state some observations on its consequences, which seem important.

It is laid down that pleading double is not permitted; that is, two distinct defences cannot be pleaded in one plea. A second plea is not permitted.

Now suppose a case, in which a defendant had two distinct probable defences against discovering, by the above rule he cannot plead them in one plea. If he plead one and it should be found defective and be overruled, he cannot then plead the other, and then if he cannot make use of it by answer, he is deprived of availing himself of a valid defence, by having (perhaps from misjudgment only) taken an insufficient one at first.

The reasons for not permitting double pleading are the convenience of having a single issue for the jury to try, and the saving expence. If two points might be put in issue by a plea, more might; and a plea would then become an answer, and the benefits arising from the cause being taken up upon a single point would be lost.

Lord Thurlow in the above case of *Whitbread v. Brockhurst*, says—"The reason why a defendant is not permitted to plead two different pleas in equity, though he is at law, is plain. It is because at law, the defendant has no opportunity, as he has here of *answering* every different matter, stated in the bill." And Lord Redesdale, after commenting upon the reasons against double pleading, says,—“This reasoning perhaps does not in its extent apply with equal force to the case of *two several bars*, pleaded as *several bars*, though to the same matter; and it may be said, that such pleading is admitted at law, and ought therefore equally to be so in equity. But it should be considered, that a plea is not the *only mode of defence in equity*, and that therefore there is not the same necessity as at law for admitting this kind of pleading.”

These remarks apply unanswerably, when the defence is to the *relief*. But the general rule in discussion must produce

Whitbread v. Brockhurst, reported from a note of Sir. S. Romilly, 2 Vesey and Beames, 153, (Note c.)

Mitt. Treat. 234.

numerous cases in which a *plea* would be the only mode of defence in equity against *discovery*.

There is one mode, perhaps justified by authorities, which would obviate this difficulty. By allowing that several pleas in bar may be pleaded to a *discovery*, if they are all put in at the same time.

1 Harg. Jurid.
arg. 482.
cited in
Cooper's Eq.
pl. 226, and
Beame's pl.
in Eq. 15.
quoted wrong
in both.

Mr. Hargrave in his argument in the exchequer, in *Liverpool v. London*, says,—“It is said in a manuscript of Lord Nottingham, that no man shall be permitted to plead two several dilatories at several times, nor several bars, because he may plead all at once. This passage certainly imports that in the opinion of Lord Nottingham, both several dilatory pleas, and several pleas in bar, might be pleaded, so that they were pleaded at the same time.”

2 Atk. 51. and
3 “ 241.

Mr. Hargrave then cites *Ashhurst v. Eyres*, and adds,—“Here five several matters were thrown into one plea; but all conducing to one point, that is, against the plaintiff's right of *discovery*, the plea was allowed.”

“The bill in *Ashhurst v. Eyres*, was for a *discovery of assets*. Defendant pleaded, that his brother, the co-obligor, received none of the money, was only a surety; that plaintiff had accepted a composition without privity of his brother, or the defendant.—That no demand had been made within 18 years;—and that the principal died seized of real and possessed of personal estate, and his representatives ought to be made parties.”

Prac. Reg.
328. And
see Curs.
Cane. 187.

“All or several of the matters in bar, may be pleaded together.”

One principal objection to double pleading is, its embarrassing the trial by a multiplicity of issues. This is avoided, where, though there are several pleas, each plea is single, and of a distinct matter, forming a single issue. It should also be observed, that the delay and expense of going through the Master's office, before the judgment of the court can be had on the defence, is avoided.

And in a late case the pleading of two distinct matters was allowed by the court on special application. Per Vice Chancellor.

4 Madd. Rep.
244.
Gibson v.
Whitehead.

In this court, the ordinary practice does not admit a double plea. Where however great inconvenience would be sustained, as, where long accounts must be set forth, in consequence of not being able to plead a double plea, the court would, I think, on a special application, give leave to file it. I do not remember such an application to the court, but I see no objec-

tion to it. A special motion was accordingly made, for leave to plead two distinct matters stated in the notice :—

It was not opposed, and the order was made."

SECOND.

The second head of discussion is an examination how each particular case upon which the rule has borne, stands upon authorities; that it may be ascertained, whether the case is governed by the rule, or forms an exception.

The *first* exception is that the matter is scandalous.

Mitford's
Trex. 244.
ante.

This defence is wholly governed by the enquiry as to the materiality and relevancy of the matter. If relevant it is not scandalous. The objection on the ground of the immateriality of the matter was before considered.

Secondly. There is a class of cases usually cited upon this subject in which the defence by answer has been overruled, which do not seem to depend upon the principle that the objection cannot be taken by answer, but upon a more general principle, that it cannot be taken at all, in any form.

Such are cases where the plaintiff seeks the discovery to *substantiate* or *aid the title*, upon which his right to an account, or relief depends.

As in *Hall v. Noyes*,—Counsel took the distinction and placed their case upon it, that though the court would compel an *answer as to the title*, it would not compel an *account*, till the *title* was established. Lord Thurlow decided that the answer was insufficient upon that distinction, (the propriety of the alternative of which has been before remarked upon.) The reporter's marginal note is,—Where the account is incidental to the *plaintiff's title*, defendant must set it forth."

3 B. C. C.
483. ante.

Taylor v. Milner. The case is fully stated before. The Master of the Rolls, said,—“ This case is different in principle from those of a total *denial of title*, where the defendant has not been compelled to give that *discovery* which is *merely consequential*. But this plaintiff comes for a *discovery of facts* and circumstances relative to the transaction, alleging that if fully disclosed, they will lay the *foundation of an action at law*.” To this his honor thought he was entitled.

10 Vesey,
444. and
11 Ves. 42.
ante.

This it appears is the point decided by the case.—These are cases of answers.—Many of pleas have been determined on the same doctrine.

2 B. C. C.
146.
ante.

Newman v. Wallis.—After arguing against a plea of “not heir,” Lord Thurlow says,—“But if in general, a defendant could protect himself by such a plea, yet in this case it would be impossible, where the sole object of the bill is *the discovery*, whether the plaintiff is *not heir*. How can he answer “not heir,” without answering the pedigree by which he *states* himself to be such?”

Ante.
16 Vesey,
262.

“So in *Jones v. Davis*,—The plea was overruled, because it did not deny the fact of *accounts having been kept*, which Lord Eldon said, would have furnished *evidence* of the *promise* to keep them alleged in the bill, and the establishment of which would constitute the *plaintiff's title*.”

2 Vesey &
Beames, 363.
1814.

“*Evans v. Harris.*—The bill stated a written agreement, retained or destroyed by defendant; and then alleged certain facts as evidence of a written agreement having been made. The plea set up the statute of frauds, without answering those allegations.

The Vice Chancellor said,—The question comes to this, whether, when the relief rests upon one *material fact*, as evidence of which several *collateral facts* are *charged*, it is sufficient to deny the substantive fact, or whether a defendant must not discover the *collateral facts*?

Can a defendant protect himself by a negative plea from the discovery of a variety of circumstances charged, which, if discovered, would establish the fact in issue?—Suppose a bill alleging that a partnership was made out by certain documents, or admissions, would it be sufficient to plead to such a bill a mere denial, that the partnership ever existed, stopping there? I cannot distinguish this case from *Jones v. Davis*, which is a clear decision of the Lord Chancellor, that a *mere denial of an agreement*, without *denying the circumstances charged as making it out*, will not do.—Plea overruled.”

3 John. C. C.
384. 1818.

“So in *Goodrich v. Pendleton.*—The bill charged the receipt of a sum of money by the defendant as a trustee. It also stated *certain facts, shewing* he was a trustee. Among others, that he gave an acquittance for the money, in *that character*. The defendant plead the statute of limitations, with a general denial, that he received the money as trustee, by averment in the plea, and also by answer, without replying to these facts charged.

Chancellor Kent.—The defendant cannot be permitted to shelter himself under the statute, by a mere denial of the receipt of the money as trustee; while he leaves all those facts or charges uncontradicted, which establish the existence of the

trust, and show that he did receive the money as such agent or trustee."

It need scarcely be observed, that the defence of a tendency to criminate, or as a purchaser for valuable consideration, are exceptions to this class of cases, as well as to any other.

A case may be stated to illustrate the distinction taken and supported by the above authorities. If a bill stated a partnership, and alleged that documents in the defendant's possession would prove it, and then proceeded to pray an account, it would be impossible, by any denial of the partnership, to avoid answering as to those documents and proofs, because the discovery sought, is to make out the *title alleged*. But if the bill merely alleged a partnership, and the defendant denied it, there the question, whether the denial can be made *by answer* so to bar the discovery of profits, properly arises.

2d. Another case in which the rule is clearly settled is.—Where the defendant has made a partial discovery on the very matter, which he objects to disclose farther.

Dolder v. Lord Huntingfield, was cited before for some general reasoning of Lord Eldon. The point decided was this.—^{11 Vesey, 283, ante.} The bill stated a remittance by the former government of Switzerland to the defendants of certain sums of money, to be invested in the funds; their investment; reception of dividends, &c. It also stated the nature of the former government, the revolution it had undergone, and that the plaintiffs now composed the executive of the government; that the funds were national property, and prayed an account, &c. Defendants *answered*, admitting the *remittances* and *investments in the funds*; insisting that there was no such persons now in the government under such *titles as those* who had placed the money in *their hands*; and therefore the plaintiffs had no right to the relief prayed, or account of the dividends. The defendants had applied for leave to demur, which was refused, the time having expired.

On exceptions, counsel said—That the question was,—“Whether the trustees having admitted, that the fund is in their hands and that they *have received* the *dividends*, shall not state *what dividends*.” And Lord Eldon said,—The defendants applied for leave to demur alone, having got into a situation in which they could not do that—then the answer is new in this—that the defendants not being allowed to demur to the discovery, or the relief, will discover *what they please*, and refrain from discovering the rest.—Putting in an answer that objection both to discovery and relief, which ought to have

come by demurrer, upon that ground, refusing this, I cannot be said to shake any of the decisions.—Answer held insufficient.”

Cooper's Cases, 212. ante.

The case of *Jager v. the Regents Canal Company*, may also be arranged under this head.

And in *Philips v. Prevost*, Chancellor Kent says—“It is no doubt a good general rule, that the defendant should not stop short in his answer. If he consents to detail part of a conversation, why should he not detail it entirely? If the defendant in this case had given an account of the assets in part, he ought to have done it in full, because he should have taken the objection in time if he intended to rest upon it.”

I cannot perceive a solid reason for this distinction; and it must be observed, that Lord Eldon does not recognize it. He decides indeed, that the partial disclosure upon the matter is enough to compel a full disclosure as to it, but is very far from sanctioning the other branch of the distinction, viz. that if the defence had been taken by answer, without giving the partial discovery, it would have done. The supposition is, that the objection is a full defence to all discovery and all relief, if it is proved. Why does not this apply with as great force, where a defendant has begun to disclose particular matters, as where he refuses at once. It may be idle and trifling, and may be punished in settling the costs, but it cannot vary the principle and rule. Suppose a charge of a partnership, and an inquiry as to the proceeds of various speculations, as to which it existed, or for a general account of the concern.—According to this distinction, if the defendant should explicitly deny the partnership, without proceeding to discover as to the speculations, his answer shall be a defence; but if he were to state some facts as to a particular speculation, he must go on and state it fully; that is, a greater portion of unnecessary matter must be set forth, because a portion has been already. The court might charge him with the costs of the matters needlessly set out, if his defence was established, but I cannot discover why it should not hold, that he may as well stop short a discovery commenced, as decline giving any. In each case, the point is to establish the title, which is to give a claim to a consequential discovery of the whole accounts, or the residue of the accounts.

3d. The case of a defence consisting in a tendency of the answer to criminate the party, or subject him to pain, penalty, or forfeiture is universally admitted to be a defence, which may be taken by answer as well as in any other mode.

I shall only cite two strong cases to this point.

Williams v. Farringdon. Lord Thurlow said,—Where a bill tended to charge a defendant with a crime, and make him liable to a penalty, if the crime or penalty is created by the statute or common law, the defendant need not plead or demur to it, but upon exceptions to the answer, might insist he was not liable," (to answer.)

3 Br. C. C. 39. See the cases collected in Beames Plea. in equity, 259 to 264, and Raithby's note to 1 Vernon, 110. Paxton v. Douglass, 19 Vesey, 925.

"On the usual decree for an account, interrogatories were exhibited for the examination of a bond creditor coming in, whether the bond was not given for an illegal consideration, viz. the sale of the command of an East India ship. The creditor declined to answer, not only directly to the fact, but other questions, as, what was the consideration, and why the debt had not been proved under a commission of bankruptcy. The Master reported the examination insufficient. On exceptions Lord Eldon said,—In no stage of the proceedings, can a party be compelled to answer any questions accusing himself, or any one in a series of questions that has a tendency to that effect; the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer, containing nothing to affect him, except as it is one link in a chain of proof, that is to affect him. I have looked through all the cases, and I find the distinction between cases supposed to have a tendency to criminate, and questions to which it is supposed answers may be given as having no connection with the other questions, is so very nice, that I can only say that the strong inclination of my mind is to protect the party against answering any question not only that has a direct tendency to criminate him, but that forms one step towards it; and that as these interrogatories are framed, the party cannot be compelled to answer."

A purchaser for valuable consideration without notice may defend himself from discovery by answer as well as plea.

The case of *Jerrard v. Saunders*, is the leading one on this point. The defendant having set forth distinctly the chain of title to himself, as assignee of a mortgage, and denied all the circumstances charged as shewing notice, then refused to answer as to a lease, deed of settlement, and various assignments under which the plaintiff claimed, and one of which was charged to be in his possession. Defendant was not himself the purchaser, but the mortgage was given him by the will of the purchaser, and his denial of the circumstances as to notice was that he did not know or believe, that an abstract of the adverse

2 Vesey, Jun. 454.

title was sent to the testator, or any one under whom he claimed, and believed the testator paid the money without notice of the title set up by the plaintiff.

Lord Loughborough said,—“He was satisfied the court would never extend its jurisdiction to compel a purchaser, who has fully denied all the circumstances from which notice may be inferred, to go on and make a farther answer as to the circumstances that are to blot and rip up his title.”

The corroborating cases are,—A case in the exchequer before Baron Parrott, cited Br. C. C. 487, the admission of Lord Eldon in *Rowe v. Teed*, 15 Vesey, 372, and *Jaques v. Methodist Church*, 1 John. C. C. 74.

The case of a denial of copartnership stands thus upon the authorities. In the first place it is expressly settled, that it may be taken by plea. *Drew v. Drew*, is a formal decision to this effect.

Ante.

Ante.

Ante.

Methodist
Church v.
Jaques.

As to its admissibility by answer, *Jacobs v. Goodman*, is the case usually relied upon. The other authorities are the following.—Lord Loughborough in the *Marquis of Donnegal v. Stewart*, said,—the question upon a partnership has been decided in the case of *Sir James Cockburn v. Sir L. Dundas*, where the defendant denied the partnership.” It is plain, he means, that the defence by answer was admitted. Lord Thurlow seems to admit *Jacob v. Goodman*, in *Hall v. Noyes*. And Chancellor Kent says,—he takes this to be an exception to the general rule.

Ante.

In Faulder
v. Stewart,
Shaw v.
Ching,
Rowe v.
Teed, and
Somerville
v. Mackay,
4 Mad. Rep.
252.

On the other side is the decision in *Shepherd v. Roberts*, qualified however by the assertion, that Lord Thurlow changed his mind, when the case came again before him;—the decision of Lord King in *Hornby v. Pemberton*, and the powerful circumstance, that the reasoning of Lord Eldon against the admission of this defence by answer, is most frequently used in cases of a denial of partnership, and when of course, if he had considered it an exception, he would have stated it as such, as he does those of penalty, and a purchaser. But farther than this, many of his arguments are pointedly against it. And lastly the case of — *v. Harrison*, before cited, is an express decision, it cannot be taken by answer.

15 Vesey,
372.
16 Vesey,
382.

Rowe v.
Teed,
15 Vesey,
372.

The cases of *Rowe v. Teed*, and *Somerville v. Mackay*, are useful to illustrate the obvious position, that if it appear doubtful upon the defendant's own answer, whether he is entitled to the defence he sets up, he must answer fully.

“The plaintiff claimed as *part owner* of a privateer, and prayed an account of the produce of prizes. One of the de-

defendants answered, stating that *no bill of sale* had been executed by the original owner to the plaintiff, although the purchase had been agreed upon,—then admitting, that the ship was registered in the plaintiff's and defendant's names,—that the ship made several captures between the 14th January, and 12th of June, 1805, and afterwards, that on the 12th June plaintiff agreed to sell his share of ship and prizes to the defendant and another, to whom a new registry was made; then gave an account of the prizes between January and June, insisting he was not bound to set forth an account as to the period during which the *plaintiff was not owner*.

The Master allowed exceptions to the answer.—On exceptions to his report, Lord Eldon, after critically commenting upon the answer, and stating the sale of the 12th June to be on the face of the answer incomplete, observed,—“I conclude that this is not a case in which I can say, there is one clear fact, or such a combination of facts, giving as the result one clear ground, upon which the whole equity of the bill may be disposed of. First,—*It is very difficult to say upon this answer, there is a positive affirmation, that there was no bill of sale.*

Second,—*It is argumentative.*—I deny you were owner in January, but lest you should turn out such, I give an account up to June, when you ceased to be an owner, if one before; and that allegation under which he limits the discovery is made upon a supposition inconsistent with the statement that accompanies it.” Exceptions overruled.

Lord Eldon gives this summary of the case.—“The plaintiff stating a partnership, founded upon certain terms contained in a written correspondence, contends, that the meaning of the parties was, that no trade should be carried on with *Russia except on the joint account*; alleging that defendant did, concealing the fact, carry on a *separate trade*, not only with Anderson & Co. (a particular house in Russia, the usual agents of defendants) but contrary to the agreement, with other persons; and insisting upon a right to a moiety of the profits.

The course taken by the defendant is to insist by answer, that according to the true construction of the letters, containing the agreement, he had *full liberty to carry on this separate trade*. That afterwards he carried it on with the leave of the plaintiff, referring to the letters. The defendant says, he will state, though the plaintiff is not entitled to the discovery, that he did so trade at a considerable profit, and that he kept books and accounts, setting them forth by schedule, yet by the same answer refusing to permit the plaintiff to look at them.

Somerville v.
Mackay,
16 Vesey,
382.

As to the conclusion of fact, it is by *no means clear*, that the defendant had any right to trade with other persons, but upon the letters considered as an agreement, the far better opinion is, that he had no right to trade separately with *Anderson & Co.*" The question arose on a motion that defendant produce the books, &c. mentioned in the schedule. And the motion was granted.

The defence that the plaintiff is not executor, or administrator, cannot be taken by answer.—It clearly can by plea.

"The plaintiff entitled himself as administrator, and defendant plead he was not administrator. It was allowed."

Mr. Vernon adds it is a good plea in abatement.

See also *Fonblanque*, 2. 485. n. c., and *Forrest's Rep.* 90. (n) 1. and *Mitf. Tr.* 188. There is no case allowing it to be taken by answer. It must therefore fall within the general rule.

There is another principle of the court influential upon this general question where the defence consists of the want of title of the plaintiff; viz. that a demurrer will lie wherever there are not circumstances stated in the bill, making out a title *prima facie*, but an allegation of title only.

Mitf. Tr. 121.

"Pleas of want of title, generally extend to the discovery, as well as the relief. It cannot often be necessary to make defence on this ground by way of plea, for if facts are not stated in the bill, from which the court will infer a title in the plaintiff, though the bill contains an assertion that the plaintiff has a title, the defendant may demur. Thus, the plaintiff stated an incumbrance on real estate devised to him, and prayed that the personalty might be applied to pay it, alleging that it was the debt of the testator. A plea that the testator had done no act to make it his debt was overruled; because whether his debt or not, was matter of inference from the facts stated, and a demurrer was the proper defence. The defendant afterwards demurred, and it was allowed."

Citing
Tweddell v.
Tweddell,
in Chan.
1784.

An executor who denies the foundation of the claim of a plaintiff, viz. a debt from the estate, cannot do it by answer, but must set forth the account.

There are more express authorities for this position than against it, and the general rule must therefore unquestionably prevail.

Hardress,
188. ante.

"*Randall v. Read.*—The court in this case, having held that the custom of tythes must be proved first before they

would hold the defendant to answer further, and observing that a man upon pretence of being joint tenant, might make another discover, what goods or writings he had, which would be strangely inconvenient, add,—“But where there is no such great inconvenience, as upon a bill against an executor, to discover assets upon a bond or debt, there he must answer, though he deny the debt.”

Lord Redesdale adopts this position as law, citing the above *Tr. Pl. 248*. case. And Lord Hardwicke also sanctions it in *Gethip v. Gale*.

In opposition to this is the case of *Phelips and Cancy*, 4 Vesey, 107, stated fully before.

A mere witness who would protect himself from ^{discovering} ~~discovering~~ must do it by plea or demurrer. If he answer, he must disclose fully. The leading cases are *Cookson v. Ellison*, and *Cartwright v. Hately*, in support of this position; and *Newman v. Godfrey*, against it. In *Taylor v. Milner*, the Master of the rolls said,—“I take it to be settled, that if a person who is only a witness submits to answer, he must answer fully.” *Ante. 11 Vesey, 42.*

Mr. Cooper states the rule in nearly the same language.—*Eq. Pl. 316*. And Mr. Maddocks says,—“if a witness does answer, he must answer fully.” *2 Ch. 286.*

A distinction has been attempted upon this subject, first taken by counsel in *Newman v. Godfrey*, viz. that if a witness begins to answer to a particular fact, he must go on, as in *Cookson v. Ellison*, where the party answered as to part of the conversation to which he was witness, and refused to answer as to the rest of it; but if he answer no more than is necessary to establish his situation as witness merely, he need not proceed. It is obvious, that the terms in which the rule is expressed, by the above quoted authorities, is against this distinction, and *Cartwright v. Hately* is precisely opposed to it.

This decision as to a witness will appear very illustrative of the strength of the general rule, by referring to the marked disapprobation of the court upon the practice of making a mere witness a party.

In *Fenton v. Hughes*, Lord Eldon said,—“It was admitted that it was impossible to file a bill against a person who is a mere witness, if the object was relief in equity.” *7 Vesey, 289.*

Sir Joseph Jekyll said,—“It was a general rule that no one should be made a party against whom if brought to a hearing, the plaintiff can have no decree.” *3 P. Wms. 311. n. 1. and see the cases cited in note E. to 1st Vesey, Jr. 293.*

There is one admitted exception to this principle that of a secretary to a corporation.

Wych v.
Meal,
3 P. Wms.
311.

"The secretary of the East India Company was made a defendant to discover some entries in the books : he demurred as having no interest, that his answer could not be read against the company, and the plaintiff might examine him as a witness, and it was plain he could have no decree against him. But Lord Talbot overruled the demurrer, upon the ground of the difference between private persons and a company, who answered under seal, and however falsely could not be punished for perjury. Besides though the answer of the defendant cannot be read against the company, yet it may be of use to direct the plaintiff how to draw his interrogatories, towards obtaining a better discovery."

In Fenton
v. Hughes.

Lord Eldon reasons strongly against this decision but admits the law to be settled as there determined. On the last reason given by Lord Talbot, he observes,—“ It is very singular to make a person a defendant, in order to enable you to deal better and with more success with those whom you have a right to put upon the record.”

It must be noticed, that the answer of a witness is wholly useless and superfluous, except from the convenience pointed out by Lord Talbot ; because the rule is very decisive that the answer of a defendant cannot be used against his co-defendant,—and it may from this, and the remarks of Lord Eldon be argued, that the rule as to disclosing fully ought not to be pressed in the case of a mere witness, when it only obtains what is useless in the cause. It has however been applied, when the court felt the above objection, and pointed out a mode to avoid it.

In *Cartwright v. Hatley*, Lord Thurlow said,— that though they could oblige the son (who was merely a witness) to answer, yet they could not get a decree *ad computandum* against him, and suggested whether the plaintiff would not take a decree against the father, with liberty to examine the son upon interrogatories ; adding that in his answer, they would perhaps get it from him in a less efficient manner than by interrogatories. The plaintiff agreed to the proposal, and the decree was so made.

4 John.
C. C. 214.

“ In *Phillips v. Prevost*, the chancellor stated, that he had recently held in the case of *Green v. Winter*, upon exceptions to an answer, that where a defendant had disclaimed all interest in the subject matter of the interrogatory, and reduced himself to a mere witness, that he was not bound to answer interrogatories as to the situation and value of the subject. The inquiry would be perfectly useless, for the answer could not be read against any other person.”

CAP. XIII.

SECTION 3.

REFERENCE OF A SECOND ANSWER FOR INSUFFICIENCY.

THE only points upon this reference, distinct from those which arise on a first answer, are 1st. That the exceptions (except in the case of an amended bill) should be the original exceptions merely,—and 2d, a question, on which there exists some obscurity, viz. whether a defendant who has submitted to exceptions or has not excepted to a report of insufficiency, can avail himself of the same defence on a second answer, which he used or might have used on his first.

As to the first point :—

1st. “ I take this to be the practice, that if exceptions are taken and the answer is insufficient, the plaintiff not moving to amend, and the defendant answers the exceptions, when that answer comes in, the plaintiff cannot add to the number of the old exceptions ; but if not satisfied, must contest with the defendant, whether he has answered the old exceptions. It is usual and even necessary to refer the answer back upon the old exceptions.”

Lord Eldon,
Partridge v.
Leycraft,
11 Vesey,
575.

If the plaintiff amends, he may take new exceptions pertinent to the amendments.

Lord Eldon said,—“ The Master of the rolls has stated to me his opinion after great consideration, in which opinion I agree, that, where an original bill has been filed, and exceptions have been taken to the answer, and the plaintiff moves to amend, if he goes upon the answer to the original and amended bill, as insufficient, he must go before the Master upon the old exceptions as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments.”

Partridge v.
Leycraft,
ut supra.

Where this new matter is of a separate and distinct character, no difficulty appears in this practice. Thus on the former argument of the case, Lord Eldon said,—“ Where the case is merely the old bill left as it was, unaltered, with allegations, introduced by amendment, substantive, independent allegations, the sensible rule is, that the old allegations being neither in form nor in substance touched by the new matter, a new exception should be taken, not as to the old matter, but as to the amendments.”

But the difficulty which pressed very much upon the court in this case, was, where the amendment consisted merely in a modification of a statement in the original bill, insomuch that the first answer, though perhaps sufficient as it then stood, was made insufficient by the modification; and the answer to the amendment was not an answer to the whole fact as it stood upon the original statement coupled with the modification.

Thus the Master of the Rolls said,—“Supposing a case in which the introduction of circumstances by amendment may vary the quality and colour of the facts in the original bill, so that it may be impossible to separate and distinguish them, and to say a fact has received a sufficient answer by the first answer, or by the second answer, and it remains therefore in its new state unanswered.

How can it be brought before the Master but by a new exception? As amendment it might be answered by the second answer; but as to a fact taken from the original bill, and coupled with the other circumstances introduced by the amendment, it might not be answered.”

It was upon the argument drawn from this difficulty, that the counsel for the plaintiff chiefly relied in support of the course he had pursued. The defendant submitted to exceptions, and the plaintiff amended his bill, and obtained the usual order, that defendant should answer the amendments and exceptions together. When the further answer came in, the plaintiff again excepted; taking a *new set of exceptions*, extending to the *original bill*, as well as the *amendments*.

The Master refusing to proceed upon the new exceptions, the point was brought before the Lord Chancellor on motion.

After twice hearing the matter argued, and calling in the assistance of the Master of the Rolls, Lord Eldon, after stating as above quoted, the opinion of the Master of the rolls and his own, that the plaintiff after amendment, must go before the Master, upon the old exceptions as to the original bill, and upon new exceptions as to the new matter of the amendments, adds, “that the utmost he can have is, the Master’s judgment upon the answer to the amendments with reference to such parts of the *original bill* as apply to them. If the original words apply to the amendments, the Master considering, whether the answer is sufficient as to the amendments, must take into his consideration every thing in the amended bill that gives a construction to the amendments.”

I do not distinctly see that this rule meets all the difficulties. It provides fully, that the exceptions on the amendments shall be answered. If they are combined with the ori-

ginal bill, the two may be viewed together, to see that the amendment is fully answered. Thus in the case of notice stated by Mr. Bell, the amendments go to prove notice in defendant, the new exceptions are to be limited to that fact, though if that fact will receive any illustration or support from the statements in the original bill, the Master may consider both—but the case does not establish the converse of the proposition, viz. that in considering the old exceptions upon the original bill, every thing in the amendments affecting the statements there contained may be considered.

I submit the following view of the point.

An amended bill is held a continuation of the original bill, and they two reckoned as one : they both make up but one record. A second answer is part of the first answer, as much as if it had been engrossed in the same parchment, and a part of the same record. If it repeat the first answer it may be referred for impertinence.—It should only refer to it.

Harr. Prac.
Tit. Am.
bills.
Lord Hard-
wicke.
Hildyard v.
Cressey, 8
Atk. 303.

Now suppose an answer reported insufficient, then amendments of the bill, and the usual order to answer both.

Suppose these amendments vary the case, as it stood upon the old bill, in such a manner, that exceptions which were then sufficiently answered, or need not to have been answered, now should be answered, or answered farther.

If in such a case, the bill is treated precisely, as if it were an original bill never amended, and the two answers precisely as one answer, where does the difficulty exist? The Master disregards every question as to the sufficiency of the first answer, upon the given point, as that point stood upon the old bill or the sufficiency of the second answer as to the amendment merely. Unembarrassed by this, he looks to the fact as now charged, upon a bill taken as an original bill, and to the reply given in either answer, or in both combined, taken as one answer. It is true that where there are special interrogatories, they may be defective, unless also amended, but the general one would perhaps help them.

To apply this view to the cases stated by the court or counsel as illustrating the embarrassment, Mr. Bell said,—“Suppose an answer setting forth various deeds and writings; a general exception that the defendant has not set forth all the deeds and writings relating to the matter in question, and an amended bill stating other writings particularly. The answer might be full to the original, and not to the amended bill.”

Now in such a case, if the bill is treated as a whole indivisible bill, it is manifest that the answer is not full, that the

exception is broad enough, and in his second answer, he must set out the other deeds.

"Suppose," he also says, "after exceptions allowed, the bill is amended by introducing new facts which satisfy the Master and Court, that the party cannot insist upon notice, (Quere want of) by way of defence. If that should come on upon the original matter, a denial of notice might answer those exceptions; but if those exceptions were to be argued upon the matter introduced by the amendments, they would hold."

I take the case put to be, that of a purchaser for valuable consideration denying notice. Now the reason, that the exceptions supposed would be disallowed on the first bill, is, that the denial of notice rendered the matter of them immaterial by giving a defence, but this reason is struck away by the amendments, and they are made material. Had the matter of the amendment been in the old bill, the exceptions would have been good. Consider that matter then as in a fresh bill, freshly to be answered, and they equally must hold. A similar remark will apply to the case stated by Lord Eldon.

"If the plaintiff's merits depended upon the point, whether a fact had taken place within ten years, and ten exceptions were held immaterial as that did not appear; an allegation that the fact has been done within ten years might be introduced in the amended bill, &c."

The counsel suppose one other case.—"In the case of a parol agreement denied, and another agreement introduced by amendment admitted, which would give the plaintiff a right to inquire into the particulars charged by the original bill, this consequence would follow; that the defendant might put in an answer admitting that agreement, but not any of the facts connected with it." Lord Eldon says,—"I was struck with the case of a bill for specific performance of an agreement amended."

Now if I am correct in the principle laid down, it is plain, that the agreement stated in the amended bill, and admitted in the second answer, is the only agreement the Master is to look to; and by this he is to test the exceptions. If the admission entail the necessity of answering the further charges of the bill, it appears to me to be the technical, as well as the clearest rule, to consider it as an admission of an agreement originally stated in the bill, and admitted by the first answer.

It ought to be noticed that Lord Manners appears to have thought of this point in the following passage, and to have provided for it.

"According to the decision of *Lindsay v. Lynch*, (2 Sch. & Lefroy, 1.) the plaintiff in this case is obliged to abandon the agreement stated in the original bill, and adopt that admitted in the answer, by filing an amended bill, and praying to have the benefit of it; and he then may refer to the allegations in the original bill, without repeating them, and obtain all the benefit of the evidence there stated, as applicable to the agreement first stated, by a charge of their being equally applicable to the agreement stated in the amended bill."

Willis v. Evans,
2d. 229.
Ball v. Beatty.

If what is said above is correct, this charge would be unnecessary. The allegations of the bill would be equally applicable to the agreement made by the amendment, as if it had been so stated at first.

By this course, the rule which Lord Eldon seems anxious to hold sacred, is preserved. No new exception is taken upon the matter of the old bill. All that is contended for is, that the old exceptions are to be applied to the facts as they stand varied or affected by the amendments.

The following case appears strongly to support the view I have taken of the point.

If the plaintiff after answer, amend his bill without excepting, the defendant need not answer interrogatories in the amended bill, which were contained in the original bill. But if the case made by the amendments is a new case, the plaintiff may call for an answer to the same interrogatories. Both these positions are warranted by the following case.

"The bill charged an agreement, in substance (as far as concerns the present point) this,—That the defendants should procure woollen goods for the plaintiffs, and charge only the price they paid to the manufacturers. It then alleged, that the defendants charged more than they paid, and interrogated as to the names of the manufacturers, and the price of the goods purchased from them; and prayed an account, offering to pay what was due, and for an injunction of a suit at law.

Mazzareddo v. Maitland,
3 Mad.
Rep. 68.
1818.

The defendants denied the terms as stated, said the sales to the plaintiffs were made in the usual course of business, and insisted that the plaintiffs had no right to call upon them for the names of the manufacturers, or the price at which the defendants purchased. Admitted they sold to the plaintiffs for a greater price,—for a fair profit.

No exceptions were taken to this answer.

The plaintiffs then amended their bill, striking out the agreement as stated, and the interrogatories applicable to it, setting forth an agreement to purchase goods of the defendants, and that they charged them as goods of a superior quality, and at

a high price, though they were of an inferior quality,—that the plaintiffs could not defend themselves at law without the evidence of the manufacturers, and interrogated as they did in the original bill, whether the goods had not been purchased of some and what persons, and at what prices?

The second answer answered the amended bill, except as to such facts as were before stated in the original bill, and to which they had before put in an answer, and to which they referred.

On exceptions, the Master allowed the second exception and others, which depended upon it. It ran thus,—“for that the defendants have not set forth from what other persons such manufactured goods had been purchased by the said defendants.” The Vice Chancellor said,—“The plaintiff amends his bill, which is a clear acknowledgment of the sufficiency of the answer to the original bill. Many of the interrogatories in the amended bill are the same as in the original bill; and in general, a defendant is not bound to answer interrogatories in an amended bill, which are the same as were used in the original bill, to which an answer was put in, and admitted to be sufficient.(a)

Sir John
Leach.

(a) So held
also in *Seely*
v. *Boehm*,
Vice Chan.
court.
2 April, 1818.
note of reporter.

But if the plaintiff in his amended bill states a new case, he may call upon the defendant to answer interrogatories contained in the original bill, because though the answer to the original bill upon the case there stated might have then been considered as sufficient, yet it may not be sufficient, with a view to the new case made by the amended bill. If the sale was at an exorbitant price, it is material to know who the manufacturers were, and at what prices they sold. The inquiry is auxiliary to the main point on which the plaintiff places his case.” He said the point was new, but he should hold the defendant bound to answer the interrogatories, though repetitions of those in the old bill.

In the case of *Smith v. Humphrey*, the following point was ruled by the Master, and submitted to.

The interrogatory of which the exception is a copy, is an amendment.

The statement upon which it is warranted is part of the original bill, and there was a former special interrogatory touching the subject matter, but by no means so extended or particular.

It is a rule that upon exceptions to a second answer after amendments to the bill, the complainant can only go upon the old exceptions as to the matters of the original bill, and upon new exceptions as to the matter of the amendments.

11 Vesey,
575,
Partridge v.
Laycraft,

Now this is a new exception, and pertinent to an original statement, not an amended one. And the question is, whether you may not amend by extending and pointing a defective interrogatory, leaving the charge untouched, and compel an answer to it? and I think it may be done. The ground of the above rule must be this.—That the defendant has a right to consider his answer to the original bill as admitted to be sufficient, excepting in those points, as to which exceptions have been finally allowed by the court. He has a right to conclude, that the complainant requires no other answer as to the matters of the original bill. But this reason and conclusion is wholly negatived, when a fresh and distinct question is put by the complainant.

The next point which arises on a reference of a second answer for insufficiency is, how far a defendant, who has submitted to answer, or on a first report of insufficiency, has not taken exceptions, can insist by his second answer upon the same objection to some of the exceptions, he took upon his first answer, or upon any new objection. Mr. Newland says,—
 “If the exceptions are submitted to, or the answer is reported insufficient, and the defendant does not except to the report, he must answer fully the exceptions, on the points reported insufficient.”

Prac. in
Chan.

The Practical Register also states :—“That the defendant not excepting to a report of an insufficient answer, must answer fully to the exceptions.” The book cites to this position *Crispe v. Nevill*, 1 Chan. Cases, 60, and adds,—But see 2 Vesey, Sen. 492.

The case of *Crispe v. Nevill*, is fully stated before.—There the exceptions went beyond the bill; but because the defendant did not except to the first report of the insufficiency of his answer, he was held bound to answer all the exceptions fully.

The case quoted from 2 Vesey, in the Practical Register is that of *Finch v. Finch*. That was a bill by a younger brother and his eldest son for the execution of a trust by settling estates in certain branches of a family. It prayed that H. the elder brother might discover whether he was married, or had issue male, who would be entitled before the plaintiff. H. insisted by answer that he was not obliged to make the discovery. The Master reported the answer insufficient. A second answer insisted upon the same, and that it would subject him to ecclesiastical penalties. This also was reported insufficient.

2 Vesey,
Sen. 492.

Lord Hardwicke said,—“The first question was, whether the defendant by submitting to answer, without excepting to

the first report of insufficiency has precluded himself from insisting on the same matter now by his second answer? I cannot say that he is absolutely precluded by the forms of the court from doing it. I have known it often determined, that where an answer is first reported insufficient, the defendant submitted to answer. Upon exception to that second answer, the like report is made. Where there are several exceptions, the court has always said, that as the matter has not undergone the judgment of the court, they shall be suffered to go into it. If it was a single exception, perhaps it would be another matter."

I shall endeavor to shew that *Crispe v. Nevill*, and *Finch v. Finch*, are not at variance by placing the former on a different principle.

Where exceptions go beyond the bill, if the defendant answer further, or his first answer is reported insufficient, and he does not except to the report, it is a submission to answer that extraneous matter.

It is then equivalent to a submission to answer charges really in the bill, which produces, except in a few cases, the necessity of answering fully. It must be noted, that he does not submit to answer the matter of the exceptions by his first answer, for that matter is not introduced till after that answer. It appears precisely like the case of a defendant beginning to answer interrogatories for which there is no corresponding charge. His submission has deprived him of his defence against answering them fully. Exceptions are special interrogatories.

If *Crispe v. Nevill*, is a decision upon this principle, it does not touch the position, that a defendant who has such a defence as may be made by answer against answering some of several exceptions, whether he does or does not take that defence in his first answer, is not precluded from taking or re-insisting upon the same defence in his second, although he may not have excepted to a report of the insufficiency of his first answer.

It is this position which it appears to me *Finch v. Finch*, very strongly supports. In that case the defence was considered, and, as to part of the discovery, admitted by Lord Hardwicke.

It remains to inquire if there is any thing to impeach the authority of that case.

Mr. Maddocks, after citing the substance of the passage from Lord Hardwicke's opinion in *Finch v. Finch*, adds,—“This position it seems is not now tenable, for formerly it was usual when one exception to an answer was allowed, the Master re-

ported it insufficient, without considering the remaining exceptions, but it is now determined the Master's judgment must be given on each exception."

Lord Hardwicke's reason for his position is, that the matter has not undergone the judgment of the court.

Mr. Maddocks says,—It is now untenable, because the Master *now passes judgment upon every exception*, which before he *did not*.

Then Mr. M. must take the judgment of the Master to be the judgment of the court, which in a sense it is, until overruled.

But Lord Hardwicke could not have meant by the terms *judgment of the court*, that of the Master, and therefore, that where there are several exceptions, the matter of defence may not have received his judgment; because the practice on a *first answer* was in his time the same as now. The Master gave his opinion on every exception whether allowed or not. It was when a second answer was referred, that he reported it insufficient, if only one exception was pointed out and allowed.

This is shown by the case cited by Mr. Maddocks.

"The plaintiff took 25 exceptions to the answer, which was reported insufficient in 22. A second answer was put in, upon which the Master reported generally, that the answer was insufficient. The defendant took exceptions to the report, as erroneous in reporting the answer insufficient in the first exception, second exception, &c. and so as to all, except two, as to which he put in a further answer.

Rowe v. Gudgeon, 1 Vesey & Beames, 333. Note 1. Nov. 1811.

Lord Chancellor.—The form of the reference is, to look into the answer, and see whether it is sufficient or not in the points excepted to. Then the defendant is told by the report, whether it is insufficient in all or any, and which of those points; but if there are twenty exceptions to the second answer, the Master's attention is called only to one; the second reference being only whether the answer is sufficient. The practice is uniform that the Master looks only at the one pointed out, and if as to that, it is found insufficient, it is all candor and courtesy afterwards.—Exceptions overruled."

It is this practice upon the second answer, that *Rowe v. Gudgeon*, when subsequently brought before the Lord Chancellor, and *Agar v. Gurney*, corrected.

See ante, page. 2 Madd. Rep. 389.

The *Compleat Clerk in court* contains the form of a report on a *first answer*, which runs,—“I find that the defendant's answer is insufficient in several points, particularly in, &c.”

Printed 1726.

I conceive therefore Lord Hardwicke means the judgment of the court in its general sense, on a hearing before the chancellor; and then his rule is explicit and decisive.

1 Harrison,
Tit. Answers.

It appears to me that Mr. Harrison has stated the rule upon this subject correctly.—“If the Master reports the answer insufficient in one single exception, the defendant must except to the report, or submit according to the report. If he doth not except, but submits to answer over, he must take care to put in a full answer, for having once submitted to answer over, he has allowed the judgment of the Master to be good against him; and in this case he shall not insist by his second answer that he ought not to answer the exceptions; nor shall he in case of a single exception afterwards except to the report, and bring it on for the judgment of the court, whether he ought to answer over or not; for this he might and ought to have done at first, and then he would have had the opinion of the court whether his first answer had been good or not, which upon his second answer he can never have, because he has concluded himself by submitting to answer according to the report.

But it is conceived this rule does not hold good in all cases; for where the Master reports the answer insufficient in three or four exceptions, it may be that one or more exceptions are fatal to the party, and so it would appear if the party excepted to the report; and therefore in these cases the party may submit to answer over as to such of the exceptions which he believes to be against him; but as to the others, if he is advised that his first answer is full in those points, or if they are of such a nature as ought not to be answered, or altogether immaterial, the defendant in these cases may, notwithstanding he has put in a further answer to the report, afterwards except thereunto, and have the opinion of the court thereon; and it was never held that he was in that case concluded by the report, or bound to answer according to the report.”

CAP. XIII.

SECTION 4.

REFERENCE OF AN ANSWER FOR IMPERTINENCE AND SCANDAL.

Equity
Draftsm. 587.

WHEN an answer is referred for impertinence or for that and scandal, the order runs,—“That it be referred to

one, &c. to look into the plaintiff's bill, and the defendant's answer, and certify whether the same be impertinent and scandalous or not."

By the settled English practice, this order is obtained on motion of course and the allegation of counsel that there is impertinent matter in the answer, merely. No exceptions are taken. The impertinent passages are pointed out on the reference. Newland, 79.

In the case of *Woods v. Morrell*, however the Chancellor said,—“ The English practice is, not to make formal and special exceptions in writing in the first instance, to an answer for scandal or impertinence, but on motion, the answer is referred to a Master, and if he certifies against the exception, the plaintiff may except in writing to the report, and specify the particular parts which are scandalous or impertinent. I find however that a different practice prevails here in this court ; and instead of a loose and general suggestion, the party does in the first instance what he may eventually be obliged to do under the English practice.” 1 Johns. C. C. 105.

Exceptions had been filed in that case for impertinence as well as insufficiency. But I do not conceive that this course has been prescribed by our court as the only proper practice, though allowed in the particular case.

“ Motion to refer a bill for scandal and impertinence. Objected that it was not of course, and that written exceptions should be filed. Motion granted.” In Chy. 28
May, 1822.
J. Wells
Dft. Wemer
Compl.

“ An order was made for the same reference on motion of course merely, in the case of *Muzzy v. Hurd*.” In Ch. June
5, 1822.

I do not perceive any ground for a distinction between the case of a bill and answer in this respect ; and the English practice appears to me preferable. If indeed the court looked at all into the truth of the allegation of impertinence before making the order, the matter ought to be clearly specified for its convenience ; but that is not the case. Before the Master, the alleged impertinence may be distinctly pointed out, and if he find it such, he must specify it in his report. If he find it pertinent, the party must specify it in his exceptions. At least the proceedings are not so loaded as by the other practice. 4 Br. C. C.
222.

Besides if formal exceptions are taken, the party must be allowed some time to determine whether he will submit to have the matter stricken out or not, and by analogy, this perhaps must be eight days. So far greater delay, and greater expense will be incurred.

Another point of difference between our own and English practice is more clearly settled. By the latter, if the plaintiff means to refer for impertinence he must do so and obtain his report, before he refers for insufficiency.

Per Lord Eldon, 14 Ves. 535 and note (a)

"There must be a judgment upon the reference for impertinence, before there can be a judgment upon the reference for insufficiency, the court not knowing what the answer is, until the question of impertinence is disposed of."

Ante.

In *Woods v. Morrell*, the exceptions both for insufficiency and impertinence were referred together, and the chancellor observed, he found it to be the practice that the objections for both go at once to the Master, and are disposed of together; that he did not perceive any strong objection to this mode of practice; and that it might save time, by admitting but one reference instead of two.

1 Swanst. Rep. 128.

An order has lately been made in England directing the reference for insufficiency to be made to the same Master as that for impertinence.

The course of proceeding before the Master is the same as upon a reference for insufficiency. The underwriting may be—"To proceed upon the impertinence in the defendant's answer." The plaintiff states the nature of the bill, and points out the portions of the answer alleged to be impertinent. The defendant then defends their pertinency.

The Master may adjourn the hearing, if he wishes further argument.

See ante Insufficiency of answers. 4 Br. C. C. 222.

No draft of the report issues; of course objections are not brought in, but exceptions are taken without them.

The Master must specify the impertinent matter in his report.

For the form of the report, See Appendix, No. 78.—a report on a bill.

By the English practice no order is entered to confirm the report. In this respect our practice differs; notice of the report being filed, and the order entered, must be given as in other cases.

Hind, 256. Newland, 37. 80.

If the report is that there is impertinent matter, an order is next entered, directing the master to expunge it. This should be with us after confirmation.

Muscott v. Halhead, 4 Br. C. C. 222.

This motion may be made immediately upon filing the report, and is of course, without notice. It is part of the order that the party pay the costs when taxed.

Hind, 256. Newland, 37 — 80.

The order being served upon the Master, he issues his summons, and the clerk in court with whom the answer is filed, upon notice, or a summons and service of a copy of the order,

4 Vesey, 217. In *Alsager v. Johnson*, the Master reported the answer impertinent from fol. 194 to fol. 1313.

There appears to me a very sufficient reason for the distinction I have taken, viz. that when the report is that the answer is *pertinent*, exceptions must specify the alleged impertinence; but if the report is that there is *impertinent* matter, a general exception will do; and that reason is,—that in the former case the report must particularize with sufficient distinctness the impertinent matter, and the court then has it plainly before it upon a formal record. Why is it not then sufficient to say in an exception that the matter reported impertinent is not so? There can be no convenience, much less necessity, in saying that that part of the answer reported impertinent, viz. (recapitulating the specification in the report) is pertinent and so throughout. But in the other case, where the Master reports that the answer is pertinent, his report is general, and therefore the exceptions must specify the matter. The alleged impertinence would not otherwise appear upon any record, and would be orally pointed out to the court, which would be inconvenient.

It frequently will occur that the impertinent matter is so combined with what is pertinent that the Master cannot properly separate them, or if he attempted it would leave the bill mutilated, and unintelligible.

In such a case it is the rule to report the whole matter impertinent, and to leave the party afterwards to new model the pertinent matter.

Norway v.
Rowe,
1 Merivald,
355.
See also
135, 136.

“The bill required the defendant to set forth a true and full account of the quantities of ore dug from certain mines, distinguishing from which they were respectively raised, the full value thereof, and how such value was computed, the time and amount of the sales, &c. and the costs and expenses of working and carrying on the business of the mines, and the profits; and how he made out such profits, &c.

Page 136.

The defendant had answered and set out the accounts in four schedules; one of which relating to the costs and expenses of working the mines incurred by the defendant, extended to 3577 folios, setting forth all the particular items of every tradesman's bill. The plaintiff alleged that the defendant was called upon to set out the total amount of each bill only.

The Master had reported the whole schedule impertinent.

Lord Chancellor said,—With regard to the Masters having reported the whole impertinent, I conceive the reason to be, that where what is pertinent is mixed with what is considered as impertinent, in such a manner as it is obvious must be the case with an answer of this description, it is impossible for

the Master to undertake to separate the one from the other. He afterwards said, he was satisfied the Master was right in reporting the whole impertinent, supposing him to be right in saying any part is impertinent."

It is provided by an order that bills, answers, replications, and rejoinders be not stuffed with repetitions of deeds or writings in hæc verba, but the effect and substance of so much of them only as is pertinent, and material to be set down, and that in brief and effectual terms, that long and needless traverses of points not traversible nor material, causeless recitals, tautologies, and multiplication of words, and all other impertinencies, occasioning needless perplexity be avoided, and the antient brevity and succinctness in bills and other pleadings restored."

"Impertinence is where a pleading is stuffed with long recitals, or long unnecessary digressions, or where a deed is stated which is not prayed to be set forth."

"If an answer goes out of the bill to state some matter not material to the defendant's case, it will be deemed impertinent."

"Lord St. John and Lady St. John had lived apart on articles of separation. A reconciliation took place, upon which an instrument was executed by them, with trustees, providing that she might, with the assent of the trustees, afterwards separate from her husband, and take her children with her; and upon such separation, reviving the provisions of the former articles. The bill was filed, after a second separation, by Lord St. John, to have these several instruments delivered up; and inquired as to the existence of disputes, and the cause of the separation.

The answer stated several circumstances of conduct previous to the first separation, as well as after the reconciliation, as to which it was referred for impertinence and scandal. The Master reported in favour of the answer.

On exceptions,—Lord Eldon concludes a powerful argument against a court of equity specifically executing articles of separation, with these remarks.

If the bill had duly brought these instruments before the court, and claimed upon the grounds of law, equity or policy, that these articles should be cancelled, and the answer had insisted upon the validity of the instruments, and contended that by contract the husband had no right to relief, that would have been a sufficient answer. It is to be lamented, that all this conduct is brought upon the record; but the bill is so framed in the interrogating part, that the differences between the

Orders by Lord Coventry, Lord Keeper, with assistance of Sir Julius Caesar, Master of rolls. Beame's orders, 69. Adopted by Lord Clarendon. Ibid. 165. and the books of practice. Harr. 42. Newland. Hind. 14. Cooper's Eq. Plead. 318. Mitford's Treas. Tit. Answer. St. John v. St. John, 11 Vesey, 526.

parties, the reasons of the separation, and for insisting upon it, and holding these instruments as evidence of the title of the defendant to insist upon it, are all subjects of inquiry. The suit therefore involves the consideration, not only, whether the deed is void, but, whether this court is to do nothing with reference to the conduct of the parties.

The questions and the nature of the suit, being such, it is impossible to say those parts of the answer which are contended to be irrelevant and scandalous, are so. The matter is not irrelevant, as it may have an influence upon the suit, attending to the nature of it.

*Fenhoulet v.
Passavant,
2 Vesey,
dear. 24.*

Exception to report overruled."

"The single question is, whether these charges referred for scandal and impertinence may be relevant to the merits; and the *majus* or *minus* of the relevancy is not material; which turns on this, whether the plaintiff has any ground for this suit or not."

*Alsager v.
Johnson,
4 Vesey, 217.*

"The defendant having rendered a bill of costs for £1000. to the executors of J. and M. Alsager, and afterwards another bill purporting to be more correct for the same business for £1400, and instituted an action to recover the amount, a verdict was entered by consent, subject to the award of the prothonotary, who reported the sum of £1175 due to the plaintiff.

The bill was filed by the residuary legatees against Johnson, and the executors charging collusion, impeaching Johnson's demand, and praying a discovery, and injunction to prevent payment. The bill contained a charge that Johnson had formed a design to get back part of a sum of money, which he owed to the estate and had paid the executors, and founded upon this, contained interrogatories, whether to effect such design, he did not deliver the two bills of costs mentioned, for business pretended to have been done by him.—Whether such business was really done, and at what times in particular.—Whether any and what sum was justly due to him from the testator; upon any and what account in particular, and if they pretend any to be due, that they may set forth how they make out the same, with all the particulars relating thereto.—Whether the defendant Johnson had not in his bills of costs charged twice for the same thing, and when.—And whether the items contained in the bill of costs last delivered, or some of them, were not similar to the items or some of them contained in the first bill.—Whether some of the charges in the last bill, were not greater than the corresponding charges in the first bill? The defendant Johnson by his answer, to account for the variation between the bills stated, that the first was made in haste in

expectation of immediate payment ; the last was made by advice of his town agent, and charges omitted were inserted, and amounts of some items of the first increased ; and the said defendant in a schedule set out how he computed and made out the sum of £1175 due to him.

The schedule was made out in the following manner :—

Bill of costs last made out, and for recovery of which the action was brought.

Attending Mrs. Alsager, &c. £0. 13. 4.

For this item only 6s. 8d. was charged in the first bill.

Difference, £0. 6. 8.

On a reference to see whether the answer was impertinent, the Master certified, that he was of opinion, it was impertinent from folio 194 to folio 1313 inclusive.

On exceptions,—It was contended that the language of the bill called for this schedule. Neither the production of the first nor second bill could have answered : a manifest purpose appears to call for a comparative detail. It was *answered*, that the defendant might have said he had no demand, but for the sum awarded ; the particulars of which consist of the articles in the bill settled by the prothonotary, from which he took certain items, and the claim is for the remainder.

Lord Chancellor said,—The schedule did not convey the information upon the question asked by the bill, if taken in the latitude to require every particular item of the account to be set out. All that can be possibly learnt from this schedule is, that he delivered one bill for one sum, then another for another sum. He has very unnecessarily mentioned wherein the articles contained in the former bill were increased, wherein diminished, and where they were added to. A reference to the bills delivered in the custody of the executors would have fully answered all that interrogatory. The scope of the bill is to ask him to set out the heads of the one claim and the other, and how the sum of £1175, comes to be the balance. He might have said the prothonotary struck off so much, and therefore that sum is the balance. The general statement of the answer conveys just as much information as this schedule.

The Master is perfectly right.—The defendant must pay the costs of the exception."

Norway v.

Rowe,

1 Merivale,

347. and 135.

“The bill set up a title to certain mines in Cornwall possessed by the defendant, prayed an account of the profits; of the quantities of ore raised, the value thereof, prices it sold for, &c. and of the costs of working the mines,) &c. &c.

The bill charged that the profits of working were great, and so would appear if the defendant would set out the quantities raised, &c. and also, *the costs and expenses of working and carrying on the business of the said mines, and the clear profits made thereby, and how he makes out and computes said profits.*

The defendant set out the account of the costs and expenses in a schedule, of 3481 folios, wherein was set forth, as it appeared, all the particular items of every tradesman's bill. The plaintiffs alleged he was called upon to set out the total amount of each bill only.

This schedule was referred for impertinence, and the Master reported it impertinent.

On exceptions to the report:—

Lord Eldon said,—The difficulty which struck me most forcibly in the course of this argument was this—whether a plaintiff who pertinaciously insists upon a full disclosure, can reasonably be allowed to object to the disclosure made in consequence of his so insisting; but whatever weight may be allowed to this difficulty in ordinary cases, I cannot conceive that there is any thing to justify a defendant in setting out all the items of a tradesman's bill, unless they are specifically called for as such. The bill seeks an account of expenses, not the mere amount of them, and an answer to that bill, stating the amount only, however much in detail, would be no compliance with the requisition. *a*) But the court, will not permit such a schedule as this, a mere transcript of tradesmen's bills.

(a) Alsager v.
Johnson,
Supra.

I have therefore no hesitation in agreeing with the Master who reported the answer impertinent.

In the case of an executor called upon to account for his disbursements, it is surely not necessary, that he should set out every separate item; and although in one sense it may be said, that such an exhibition of particulars would be pertinent, yet it would not be the less nugatory and oppressive.

The counsel in this case, speaking of the inquiry of the bill say,—It demands only the costs and expenses of working and carrying on the business of the mines, and the clear profit made thereby, and how he computes such profits. Now the term—“costs and expenses,” is clearly understood to

mean, not all the items of an account, but the general results of such items.

Speaking of *Alsager v. Johnson*, they say,—The schedule in that case, while it contained a great deal of unnecessary matter, omitted to convey any information upon that which was principally sought by the bill.”

It was urged in *Norway v. Rowe*, that parts of the schedule were not impertinent, and ought to have been separated.

Lord Eldon said,—He had examined it, and conversed with the Master on the subject of his report ; and was satisfied the Master was right in reporting the whole to be impertinent, supposing him to be right in saying any part was impertinent. The whole is so mixed together as to be incapable of being separated by him.

And counsel observed in *Alsager v. Johnson*,—*When an answer is grossly impertinent in a part which cannot be separated from the rest, the Master states the whole to be impertinent. If instead of stating the substance of a deed, it states the whole deed, the Master must report the whole answer impertinent.*”

“The bill was filed for an account, and contained the following interrogatory ;—*Whether any and what sum of money was due from the house of A. to the house of B. and how they make out the same, &c. &c.*” French v. Jacko, 1 Merivale, 357. note.

The defendant in his answer, set forth a long schedule containing an account of all dealings and transactions. This answer was referred for impertinence, and the Master reported it impertinent. On exception Lord Chancellor held the answer clearly impertinent ; saying the defendant ought merely to have answered, that such a sum of money was due, and that is was due upon the balance of an account.”

“Mrs. Peck filed her bill claiming as widow of J. Peck deceased her dower against J. Peck the eldest son. The title of the answer was,—*The several answer of J. Peck to the bill of complaint of Anna Baines, alias Green, assuming to herself the name of Anna Peck, as pretended wife of John Peck deceased.*” This answer was referred and reported impertinent and scandalous ; and the Lord Chancellor held it so, observing, there was no reason to fear that the title of the answer could prejudice the defendant as an admission of the plaintiff’s right, or work any conclusion in this court.” Peck v. Peck, Moseley, 46. Citing 1 Vernon, 107.

“The plaintiff filed his bill to be relieved upon a state bond, upon which an action was brought, stating that no consideration was given for it, and that it was agreed it should not be put in suit ; to prove which facts, he charged that no demand had been made since 1763 till the action, and that” Smith v. Reynolds, Moseley, 69. 1728.

OFFICE AND DUTIES

the defendant subsequently borrowed £300 of him on bond, which being some how lost, the plaintiff exhibited his bill in this court, and had a decree for payment. Defendant in his answer said,—that he did not know or believe that the plaintiff lost the bond, but believes that he fraudulently destroyed or concealed it. The answer was referred for scandal;—the Master reported it scandalous; and the defendant took the general exception, that it was not scandalous, because pertinent.

Lord Chancellor.—This bill is to be relieved against a state bond, and as an inducement to prove it satisfied, the plaintiff mentions the subsequent bond, proceedings, and decree in this court; in which cause the defendant never insisted on being paid the money due by this bond he has now put in suit, and therefore it is to be presumed satisfied. All this is material to the cause; but the plaintiff in his manner of setting out this transaction, takes notice, that the bond being some way got out of his custody, obliged him to sue in this court.—And the defendant in his answer says,—he believes the plaintiff did not lose it, &c. He denies what is not material, and what the plaintiff did not require him to answer. If he had alleged that he had lost it, and questioned him to it, then his answer would not have been scandalous, though immaterial, because the plaintiff led him into it;—but now he is impertinent by going out of the way purely to reflect upon the plaintiff."

Woods v.
Morrell, 1
John. C. C.
106.

Chancellor Kent.—^{thus} ~~the~~ sums up the general rule on this subject.—"As to impertinent matter the answer must not go out of the bill to state that which is not material or relevant to the case made out by the bill. Facts not material to the decision are impertinent, and if reproachful, scandalous.—And perhaps the best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties. If indeed the plaintiff will put impertinent questions, he must take the answer to them, though it be impertinent; but it will depend upon the reason of the thing, and the nature of the case, how far a general inquiry will warrant an answer leading to detail. The court will always feel disposed to give the answer a liberal consideration on this point of matter irrelevant; and to consider whether it can have any real and proper influence upon the suit, having regard to the nature of it, as made by the bill."

"The plaintiff and his wife, (she being testamentary guardian of her children by a former husband) filed their bill against the trustees of the estate of the children for a maintenance for them. The answer stated, that the plaintiff Corbett was not a proper person to have the management of the minors, being a man of small fortune, increasing family, and also a sectary. The answer on reference was reported scandalous and impertinent. On exceptions to the report, Lord Manners said, —I do not think the plaintiffs are bound either to reply to these charges in the defendant's answer, or to go into evidence to disprove them; and therefore they ought not to remain on the records of the court. The answer is impertinent."

Corbett v. Tottenham,
1 Ball & Beatty, 59.

It is before stated, that although the plaintiff prays deeds to be set out *hæc verba*; yet it is sufficient if the answer offer to let the plaintiff have copies, or sets out a part, and the court will order their production. I presume however, if upon such a requisition, the defendant did set the deeds out *verbatim*, it would not be impertinent.

GAP. XIV.

SECTION 1.

REFERENCE OF A BILL FOR IMPERTINENCE.

THE recital of deeds, &c. in *hæc verba* in a bill is *ante* impertinent, according to Lord Coventry's orders.

The same general rule as to the materiality of the matter prevails here as in case of an answer.

An amended bill repeating all the allegations and charges of the original bill is impertinent.

"The bill set forth an agreement for a lease with various charges respecting it. The ~~answer~~ ^{bill} was then amended, adopting the agreement in the answer, and restating all the acts of part performance as referable to this agreement. It set out the same correspondence, and other statements precisely as in the original bill. It was referred and reported prolix, and impertinent in repeating what had been stated in the original bill.

William Evans,
2 Ball and Beatty, 229.

Lord Manners said,—He might have referred to the allegations in the original bill without repeating them, and obtain-

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ed all the benefit of the evidence there stated as applicable to the agreement first stated, by a charge of their being equally applicable to the agreement stated in the amended bill, report confirmed."

For the form of a report of impertinence in a bill, See Appendix, No. 79.

REFERENCE OF OTHER PROCEEDINGS.

"ANY proceeding in the court may be referred for scandal and impertinence."

*Erskine v.
Garnshore,
18 Vesey.
114.*

"A motion was made to refer for scandal and impertinence a state of facts laid before the Master."

Lord Chancellor.—I am perfectly satisfied that there can be no one proceeding before this court, which if made the vehicle of scandal and impertinence, this court will not examine, with a view to reform it. A state of facts carried in before the Master is in truth carried in before the court, of which the Master's office is part. It contains all the points supposed to be put in issue, to be proved before the Master; and are persons under that colour to be libelled without the least reference to the subject of the suit? Order made."

*Price v.
Shaw,
2 Cox's
cases. 184.
1789.*

"It was moved on the part of the plaintiff, that the discharge carried in before the Master by the defendant might be referred for impertinence. Mr. Mansfield objected that there was no instance of such an order. But the Lord Chancellor said, he should consider this as much a motion of course as a reference of a bill or an answer, and made the order,"

*Phillips v.
Mullman,
3 Atk. 391.*

"Affidavit referred for impertinence."

CAP. XIV.

SECTION 2.

REFERENCE OF INTERROGATORIES, &c. FOR
IMPERTINENCE, &c.

AFTER depositions are published, if the party find any impertinence or scandal in the interrogatories, or that they are leading, a motion is made of course for a reference to the Master to examine and report, whether any and which of the interrogatories or parts of the interrogatories are impertinent and scandalous, or leading.

There is no such thing in the English practice as a reference of interrogatories before the depositions are taken, because the interrogatories are not seen by the adverse party until publication.—They are not served. This is clearly proven by the statement in Hind's Practice 394, and the other books of practice, and also by the case of *Parkhurst v. Lowten*, hereafter noticed.

I have known two instances of a reference of this kind in our court to ascertain the impertinence, scandal, or other impropriety of interrogatories, though I presume it is rare.

In the case of *Parkhurst v. Lowten*, a motion for such a reference was made, it being practicable under certain particular circumstances.

The case is very important.

“A witness had demurred to interrogatories exhibited to him on the ground that they referred to transactions in which he was employed as attorney and solicitor.

The practice was settled that the demurrer was to be set down for argument, as demurrers to a bill. The demurrer was then argued; and all the learning upon the subject of the right of an attorney to refuse answering was adduced.

The Lord Chancellor thought the demurrer bad; and an order was entered declaring that the reasons stated by the witness in his demurrer, as the ground thereof, were not sufficient to sustain it, and therefore it was over-ruled; and the commission issued having been returned, a new commission was to issue for the examination of the witness, but this without prejudice to the witness objecting or demurring in writing to the interrogatories or any of them exhibited for his examination, or to any part or parts thereof as he may be advised, upon such grounds as he shall state in such objections or demurrer.

Hind, 392.
Fowler Exc.
Prac. 2. 151.

4.

Taintor v.
Merchants'
Bank, June,
1822.
Tredwell v.
Pell, Jan.
1823.
2 Swanston,
194.

1 Merivale,
194.
3 Madd. 121.

2 Swanston,
206.

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A motion was then made on behalf of the witness to extend the minutes of the order by adding that the plaintiffs was not to exhibit any new interrogatories without leave of the court, and for a reference to a Master to settle the old interrogatories by striking out, or altering, so much as required the witness to set forth any information he had received from persons, who, or whose representatives are not parties to the cause, or any other irrelevant matter.

The counsel stated, that in the common case the interrogatories are not seen by the adverse party till after publication, and then the interrogatories and depositions are suppressed together, but where they are seen, as in this instance, immediate application should be made.—They had been copied by a clerk not towards the cause. That a considerable part of these interrogatories lead to the introduction of matter which could not be evidence.

On the other side it was insisted, that there was not a single interrogatory of which it might be truly said, that the answer could by no possibility be evidence ; that the relevance of the interrogatories could not be ascertained till they were compared with the depositions.

Lord Eldon observed,—It would be a vast thing for the court, in an order of reference to the Master to direct him to consider as irrelevant, questions relating to information from any person, who, or whose representative is not a party, *as constat* that other witnesses may not prove that the person from whom the information was given was in such a situation, that his information would be evidence.

It was also material to consider whether the interrogatories are addressed to this witness only or to others. Of interrogatories addressed to a variety of witnesses, there is a very great difficulty in saying what part is impertinent with regard to one witness without knowing the effect of other parts to be exhibited to other witnesses. How can the Master know, that the answers of the other witnesses, that are to be examined may not make the answer of this witness extremely material ? It is one thing to say, that if the court sees interrogatories, the answers to which cannot by possibility be evidence, let other witnesses state what they will, it will not permit them to be addressed to the witness ; and another thing to say, that other interrogatories shall not be addressed, which may be very material, regard being had to the effect of the depositions of other witnesses, on the testimony of this particular witness. Interrogatories, no answer to which can

be received in a court of justice, I think that I ought to struggle to strike out.

Again he observed, that he could not take upon himself to page 217. say, that no information received from any person, except a party, or the representative of a party, could be evidence. Though not evidence by itself, it might become evidence by the testimony of another person; and information may become evidence by reason of the character of the individual from whom it was received, though neither a party nor the representative of a party. How again can I say what will be relevant, unless the question is one, to which the answer can by no possibility be relevant, neither directly, nor in connection with other evidence? I cannot direct the Master to settle these interrogatories upon the principle that no information given by persons other than persons, who, or whose representatives, are parties, could be evidence; nor in our course of proceeding, is it possible for the Master to say, *ab ante*, what will be relevant or irrelevant matter.

This case may show at least the extreme caution with which a Master should treat interrogatories alleged to be impertinent.

Lord Eldon admits, that if it is very clear, that the interrogatories can by no possibility be proper, they ought to be stricken out. The subject has never been discussed before our court. I doubt if it would prescribe that no such reference should in any case be granted, but it would certainly be very scrupulous of rejecting interrogatories.

By the English practice, on a reference of interrogatories and depositions after publication, the course is this:—

The order to refer being left with the Master, and his summons issued, the Master hears the arguments on both sides, and generally takes some time to consider thereof, unless the matter appear very glaring on one side or the other; and in that case he delivers his opinion in the presence of the parties attending him, and afterwards certifies his opinion to the court, that such part or the whole of such an interrogatory is leading, &c. Hind's Prac. 394. 5.

The Master should adjourn to a day when he supposes he will be prepared, in case he does not decide at once. And if this is omitted, he should issue another summons underwritten as the former; that the parties may have the opportunity of understanding and discussing his opinion.

No draft of the report issues. When he has prepared it, he delivers it to the successful party, who with us enters an order to confirm it, and gives notice; and the adverse party Ibid. 396.

may then file his exceptions.—See the form of a report Appendix, No. 79.

2 Fowler,
Exch. Pr.
153. and
2 cases,
there cited.
Hind. Pr.
386.

After the Master has reported as to the impertinence, &c. and his report is confirmed, an order is obtained to suppress the depositions taken under the improper interrogatory. In general this order may be sufficiently precise, as where the whole interrogatory is bad, the whole answer must be suppressed. But if only part is improper, the portion of the deposition taken under it should alone be stricken out.

In such a case, the following course was taken in the Exchequer.—

Naish v.
East Ind. Co.
1734.
2 Fowler,
154.

“ Mr. Bunbury moved for the defendants that it might be referred to the deputy remembrancer, to examine and report, whether or not any, and which, of the interrogatories exhibited by the plaintiff are leading ; and if leading, in what particulars. Upon moving to confirm the report, the following words were reported, and held to be leading. “ In order to bring him home to England by force or in chains.” It was then referred to the deputy remembrancer to examine and report whether any and what part of the depositions had been taken thereon, and to report the same. By a subsequent order, the depositions taken upon this leading interrogatory were reported and suppressed.”

Hind's Prac.
397.

When the order to suppress is entered, a copy is served upon the adverse clerk in court, and then if at the hearing, an attempt is made to read the depositions, it will be frustrated by production of the order.

If the course is pursued of referring the interrogatories before publication, there must be some variation from the practice as above stated. Such interrogatories as are improper ought not of course to be administered.

There can be no better or more precise mode adopted, than that upon a reference of a pleading for impertinence.

After the report is filed and confirmed, an order of course should be entered for the Master to expunge the impertinence, &c.

Under this, a notice and a copy of the order should be served upon the examiner, that he may attend at the time appointed by the Master, with the copy of the interrogatories filed with him, as is done upon the clerk in court who has custody of a pleading. The Master will then strike out the objectionable matter. It should be made part of the order to expunge, that the party pay the costs, when taxed.

4 Br. C. C.
221.

This in the case of a pleading is always done.

"The plaintiff referred the defendant's answer for impertinence; and the Master having reported it not impertinent, the defendant moved, as of course, for a reference to tax the costs, and that the plaintiff might pay them when taxed. Tyrrell v. Redifer,
1 Merivale,
132.

Mr. Agar allowed that though costs were constantly given to the plaintiff on a report of impertinence, he had not found an instance in which the converse had been established.

The Lord Chancellor made the order; observing, that otherwise, it would be most unjust."

Having detailed the practice upon this proceeding; I shall state some of the rules of equity which the Master may be called upon to apply.

One question is whether in cross interrogatories, questions may be put to a witness, tending to shew a bias on his mind from his connection with the party, or any other source of an undue influence upon his testimony, which may form a proper subject of comment upon his credibility. Philips, 37.

I take it for granted that such questions can be asked of a witness at law. It cannot be that the witness can protect himself under the rule allowing him to refuse answering questions tending to declare his infamy, and degrade his character. Philips, 208.

It is perfectly well settled, that an examination to credit in its proper sense, that is, whether the witness is to be believed on oath, &c. must be made after publication, and interrogatories to that point upon the examination in chief, were in one case expunged as impertinent.

"The defendant examined his witnesses in chief to the character and credit of the plaintiff's witnesses. Mills v. Minn,
12 Vesey,
406.

A motion was made for the Master to look into the interrogatories and depositions, and to certify whether any of them were leading, scandalous or impertinent, or sought to impeach the credibility of the plaintiff's witnesses.

In support of the motion it was insisted, that the only way in which an examination can be had to character and credit is, by leave of the court, upon a special application and notice, otherwise it is impertinent.

Lord Chancellor said,—The only question was in what manner this could be done, whether in the original examination, or whether before publication the examination as to credit must be left to a special application to the court afterwards. That it appeared better this should be done on special application, stating that such witnesses have been examined; that the party can invade their testimony; and praying liberty to do so.

Then the other comes prepared, and the court will judge whether it is necessary or not.

He afterwards stated he had found the practice settled, that the examination to credit could only be upon special application to the court, and notice to the party."

In Hinde's Ch'y. Practice, is the form of an article to impeach the credit of a witness, one particular of which is, that the witness since his examination had confessed he was to receive a considerable gratuity, if the plaintiff recovered.

These cases it is clear, are instances of the examination of other witnesses to discredit the testimony of a former witness. And the facts to be inquired to, may either be wholly unconnected with the testimony before taken (as the instance of the declaration of the witness he was to receive a gratuity) or they may arise from what the witness has stated on his examination in chief.

Of this latter class is the case of *Chiners v. Box*, where the witness had deposed she lived with the defendant as his milk maid in 1775. It was offered to be proved, and allowed, that she did not live with him, in that or any other capacity till 1786. That she had confessed this, and was induced so to depose, by another witness, and under promise of reward. So in the case of *Ambrosia and Francia*, after examination concluded, articles were exhibited, charging that one of the witnesses described in the depositions as *Mary White, Widow*, was the wife of the defendant, and known to be such at the examination, suggesting that if she was not his wife, she lived with him, and an improper intimacy subsisted between them. The order was that the plaintiff should be at liberty to examine to that fact, and also to the competence and credit of the witness.

Cited,
12 Vesey,
324.

3 Johns. C.
C. 366.

8 Vesey, 324.

To prevent this examination going to material matters in issue, the court requires a special application for an examination to particular facts, and then determines whether they are proper to be examined to, or not.

The case of *Purcell v. Mc Numara*, was much litigated in all its stages, both as to practice, and merits.

From the report, 8 Vesey, 324. and the statement of it in *Carlos v. Brook*, 10 Vesey, 49. it appears, that the cross interrogatories exhibited by the plaintiff for the examination of the defendant's witnesses, interrogated whether the witness had not been a woollen draper, and insolvent; that he was cross examined at great length, particularly as to his insolvency. He went into the history of his whole life, and as to his insolvency, &c. It was not at all put in issue whether he had been insolvent, or had compounded with his creditors; and he had answered such cross interrogatories in the negative.

Under these circumstances, the plaintiff moved for liberty to exhibit articles to the witness' credit; interrogating whether he had not been a woollen draper and insolvent.

Lord Eldon allowed the examination to those facts, and then laid down the rule, that the examination should be generally to the credibility of the witness upon his oath, or to a matter not material to the merits, to which he has deposed.

The following cases shew the rule at law.

"A witness for the defendant was asked in cross examination, whether he had not attempted to dissuade a witness examined for the plaintiff, from attending the trial. He swore positively that he had not. Harris v. Tippet, 2 Camp. 637.

Dauncey then proposed to call back the other to contradict him.

Lawrence, J.—That cannot be done. You must take his answer. Had the matter been in issue, I would have allowed you to call witnesses to contradict what the last witness had sworn, but it is entirely collateral and you must take the answer. I will permit questions to be put to a witness, as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers he gives. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion.

Lawrence, J., laid down the same rule several times during the circuit, and it seems particularly illustrated by the following case. One Yewin was indicted for stealing wheat; the principal witness against him was a boy by the name of Thomas, his apprentice.

Lawrence J. allowed the prisoner's counsel to ask Thomas in cross examination, whether he had not been charged with robbing his master; and whether he had not afterwards said he would be revenged of him, and would soon fix him in Monmouth gaol. He denied both. The prisoner's counsel then proposed to prove that he had been charged with robbing his Master, and had spoken the words imputed to him.

Lawrence J. ruled that his answer must be taken as to the former, but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced, that they were spoken by the witness.

"On a *qui tam* action, the witness swore to usury in a contract made between the defendant and himself for a loan of money. 7 East, 108. Spencely v. De Willot.

On the cross examination it was proposed to ask him what contract he had made with a Mr. S. and some other persons from whom he had also taken up money on the same day, and on other days. The object was to draw a confession from the witness, that he had taken up these sums of money to employ as he chose, and share the profits, and then to infer, that his contract with the defendant was the same. Or if he denied that such was the nature of his dealings with them, to call the parties to contradict him.

Lord Ellenborough refused to allow the question to be put.

On a motion for a new trial, the court were all decidedly of opinion, that it was not competent to counsel on cross examination to question the witness concerning a fact wholly irrelevant to the matter in issue if answered affirmatively, for the purpose of discrediting him if he answered in the negative by calling other witnesses to disprove what he said. That whatever contract the witness might have made with other persons could not be evidence of the contract with the defendant, unless he had said they were the same, which he had not. They observed that the rule had been laid down again and again, that upon cross examination to try the credit of a witness, only general questions could be put, and he could not be asked as to any collateral independent fact, merely with a view to contradict him afterwards by calling any other witness. The danger of such a practice would be obvious; besides the inconvenience of trying as many collateral issues, as one of the parties chose to introduce, and which the other party could not be prepared to meet."

From these authorities it appears, that there are two classes of cases.—The first of questions tending directly, and in themselves to impeach the credibility of the witness, if answered affirmatively. And the second, of questions not in themselves affecting his credibility, but put with a view of contradicting him by other testimony, if he answers in a certain way, and these being questions irrelevant to the issue.

Now as to the first class, at law the rule appears to be, that questions of every kind going to impeach a witness, whether to show utter infamy of character, or an undue prejudice and bias, may be put to the witness, and the objection to answer them must come from him. Then the court is to determine, whether the objection is of such a character as exempts him from answering or not.

A court of law also holds, as to such questions as the witness must answer, being immaterial to the issue, and only to

discredit him that his answer must be taken, and no other witness can be called to contradict him.

And as to the second class of cases :—

The court will not allow the question to be put, seeing that it is wholly irrelevant to the merits, and only put with a view to contradict, if a particular answer is given.

That in a court of Equity, cross interrogatories may be filed, addressed to a witness, going to impeach his credibility, upon the examination in chief, appears from this.

1st. It is some argument, that what you may cross examine to at law, you may in equity ; no rule or principle being shown to the contrary.

2d. No solitary precedent can be found, and no case or dictum, can be produced, showing an article to credit after publication, addressed to the witness himself.

3d. That there is a clear and certain right to test the credibility of the witness in one mode or the other ; and if the latter does not appear to have been used, the former must be sanctioned, by analogy to the law.

4th. That it is settled that those questions which tend to ^{Post.} criminate a witness, or subject him to a forfeiture, &c. may be put to him on a cross examination, and the objection to answer must come from him. And this is very strong to shew, that questions shewing an inferior degree of impropriety, which he must answer, may be put to him in the same manner. Therefore they cannot be condemned prospectively.

And as to the second class of cases, viz. questions, the answers to which will not in themselves affect the witness' credit, but inquire to collateral and immaterial facts, with a view to contradict him; if his answer is one way, it is not clear that such questions are pertinent or proper.

The rule of law decidedly rejects them.

The case of *Purcell v. Mc Numara*, is however in my apprehension, an instance of such questions.

The inquiries were as to the witness having been a woollen draper, insolvent, and compounding with his creditors ; facts which if answered affirmatively, could hardly be considered as affecting his credibility. Mr. Romilly indeed expressly states, that at law there are two modes of impeaching the credit of a witness ; one by producing witnesses to swear, he is not to be believed on his oath ; the other by putting questions to him, and getting witnesses to prove his answers are not true ; that if the application should not succeed, the witness could not be affected, except by proving that he is of bad character, although at law there are two modes of affecting the evidence.

That Mr. Romilly was mistaken in the rule of law, is very plain, from the case in 7 East ; supposing him to mean, as he certainly must have meant, that these questions were to be irrelevant matters.

It may well be that if the witness has answered the interrogatory, or generally if he has gone out of a material interrogatory to state an immaterial fact, then the party shall be at liberty to adduce the proof to contradict him ; and *Purcell v. Mc Namara*, is an authority of this character. But it does not expressly decide that the questions are proper to be put, if the objection is taken.

Still it is rather strong, that in this case, which was very keenly and ably contested, and in which the Solicitor General and Mr. Mansfield were of counsel, these cross interrogatories and the depositions under them, were not referred and moved to be suppressed for impertinence, being, as I conceive them to be, to collateral irrelevant matter, not in themselves impeaching the witness for credibility.

It is possible however that the inquiries, as to insolvency were coupled with other inquiries, as to his conduct when insolvent, tending to discredit his truth.

I think it is going too far to allow questions clearly of this description to be administered, where it can be prevented. By our practice, the interrogatories and cross interrogatories being seen, this can be done.

Then if this is correct, the cases in which collateral matters stated by the witness, can be contradicted on articles to credit, will be cases in which he has stated such collateral matter, under interrogatories pertinent to the cause ; and it is to be inferred this was the case in the decisions cited in *Purcell v. Mc Namara*, in one of which the witness had described herself as a widow in the depositions ; and the other, had sworn to a residence with the defendant in a certain capacity in a certain year. But the last is clearly liable to the observation of Lord Eldon, that it was material to the issue.

I conceive also that as to that class of questions which may be administered to a witness, as tending to diminish his credit, they are proper for articles to credit after examination.

There can be no reason for a distinction, that when the witness states a collateral fact to a proper question, which in itself does not impair his credit, you may adduce evidence by articles to prove he has stated falsely, and that you may not do so, where his answer to a question allowed to be put, does in itself affect his credit.

And in this respect the rule in equity differs from that at law.

Questions tending to criminate a witness or subject him to penalty or forfeiture may be asked, and the witness is to answer or not as he thinks proper.

In *Paxton v. Douglass*, Lord Eldon said,—“ Formerly the Judge frequently informed the witness, that he was not bound to answer : so frequently as to prove, that it was the duty of the court to do so ; now it appears to be understood that he may waive the objection, and proceed if he thinks proper ; and in general it is left to his own discretion. ^{16 Vosey, 241.}

The conclusion is, that the question may be put, and then the point arises, not suppressing the question ; assuming that, if put, the defendant will avail himself of the objection.

My opinion at present is, that the objection is not to putting the question, but to answering it, when put, that the witness is before the Master precisely in the situation of a witness called to give his evidence personally ; and the objection is, not to the question, but to answering it. I therefore think at present, that the interrogatories must be put to the witness ; and it must be left to himself, whether he will answer them, or not.

In *Lloyd v. Passingham*, he states the same rule.

Ibid. 64.
June Term.
1822.

And in *Tuintor v. Merchants Bank*, this rule was recognized by the Chancellor. An order was made to look into cross interrogatories, with a view to have some which strongly criminated the witness, stricken out. The Master reported, that he took the above stated to be the rule of the court, and therefore could not certify such cross interrogatories improper to be exhibited. This report was brought up and objected to, and confirmed by the Chancellor. The course is for the witness to demur before the examiner to a question improper on this or any other ground. See the practice upon this subject detailed in *Parkhurst v. Lowten*, reported in different stages. 1 Merivale, 194. 3 Madd. Rep. 1213. 2 Swanton, 194. See also ante.

In *Lloyd v. Passingham*,—Lord Eldon observed.—I protest strongly against the doctrine, that Robert Passingham, having demurred to so much of the bill as seeks a discovery of facts, which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill ; having observed a notion prevailing lately, that a witness, who refuses to answer a question, upon that ground is therefore not to be believed. Nothing can be more sala- ^{16 Vosey, 63.}

cious as a standard of credit, than such a conclusion, or more dangerous to justice, by depriving the subject of that protection to which he is entitled by law ; and the practice formerly was, that the judge told the witness, he was not bound to answer the question.

*Dean of Ely
v. Stewart,
2 Atk. 44.*

Lord Hardwicke states,—“ Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross examine as to the same individual point, but not to any new matter ; so in equity, if a great variety of facts and points may arise, and a plaintiff examines only as to one, the defendant may examine to the same point, but cannot make use of such witness to prove a different fact.”

The rule as stated by Lord Hardwicke was explicitly laid down by Lord Eldon in the trial of the Queen.

See however 1st Espinasse's N. P. Cas. 357. 4 Ibid. 67. and Philips on Evidence, 211.

APPENDIX.

NUMBER 1.

MASTER'S SUMMONS.

In Chancery.

Between { A. B. Complainant,
and
C. D. Defendant.

IN pursuance of the authority and directions contained in an order of reference, made in the above cause, by the Honorable Court of Chancery of the State of New-York, I, M. H., one of the Masters in Chancery for the said State of New-York, do hereby summon you, C. D., defendant in the above cause, to appear before me the said M. H., Master in Chancery as aforesaid at my office, No —, — street, in the city of New-York, on the — day of —, to attend a hearing of the matters in reference before me the said Master, as aforesaid, in the said cause, to be had by virtue of the said order of the said Court of Chancery above referred to, and hereof you are not to fail at your peril.

Dated the day of in the year of our Lord

M. H. Master in Chancery.

ENGLISH FORM.

In Chancery.

Between { Complainants
and
Defendants.

BY virtue of an order of reference in this cause, of the day
of I do appoint the day of at o'clock in the noon
of that day, at my Office, No. in the city of New-York, to consider

APPENDIX.

of the matters referred, at which time and place, all parties concerned, or some one for them are to attend.

Dated this day of
Underwriting.

A. B.
Master in Chancery.

NUMBER 2.

AFFIDAVIT SERVICE.

In Chancery.

State of New-York, ss :—

being duly sworn saith, that on the day
of he served a true copy of the within summons and underwriting
upon Solicitor of the above by delivering the same to
at the same time shewing the original.

NUMBER 3.

CLAUSE TO AUTHORIZE PRODUCTION.

"AND for the better taking such accounts all parties are to produce all books, deeds and writings in their custody or power relating thereto, upon oath, before the said Master, as he shall direct."

Eq. Draftsman, 650.

NUMBER 4.

AFFIDAVIT ON PRODUCTION.

Title.

A. B. the &c. maketh oath and saith, that neither he this deponent, nor any person or persons for his use, to his knowledge or belief, nor with his privity or consent, have, or hath, or ever had, in his or their custody or power, any deeds, books of account, papers, or writings relating to the matters in question in this cause, other and except the se-

veral deeds, books of account, papers and writings mentioned in the schedule hereunto annexed and produced to the Master.(a)

Sworn, &c.

Fowler's Exch. Prac. 2. 297. 2 Turner's Prac. 42.

NUMBER 5.

CERTIFICATE OF DEFAULT IN NOT PRODUCING.

Title.

AT the request of Mr. H. the Solicitor for the plaintiffs in the above cause, I do certify that the defendants were duly summoned to produce before me all books, deeds, papers, and writings in their custody, or power relating to the accounts directed to be taken by the decree in this cause, by a day now past ; of the service of which summons upon the Solicitor of the said defendants, due proof has been made to me. But the said defendants have not produced before me such books, papers, or writings, or any of them,—which I submit and certify,

Dated, &c.

Hand's Sol. Ass. 258,

Or,

—That the defendants being duly summoned to produce, &c. applied for and obtained time therefor, which expired the day of But the said defendants have not produced, &c. (as above.)

NUMBER 6.

CERTIFICATE WHERE SOME ARE WITHHELD.

Title.

IN pursuance of the decree made on the hearing of this cause, dated the day of I have been attended by the above named defendant A. B. who hath produced and left with me by affidavit several books of account, writings, &c. in the schedule to the said affidavit de-

(a) If there are any papers which the party accounts for not producing, or objects to produce, they should be specified either in the affidavit, or another schedule.

scribed, and hath by said affidavit made oath, that neither he nor any other person or persons for his use, to his knowledge or belief, or with his consent, hath, or have, or ever had in his or their custody or power, any books, papers, or writings whatsoever relating to the matters in question in this cause, other than the aforesaid several books, writings, &c. *and except* the several books and writings, mentioned and contained in the said affidavit, which last mentioned books and writings the said defendant A. B. did not produce before me, for the reasons alleged in his said affidavit, a copy whereof I have hereto annexed. All which, &c.

Hand's Sol. Ass. 260.

(If the Master is dissatisfied with the reasons assigned, and has summoned the party to bring in the particular papers, the certificate will proceed.)

And having considered the reasons so alleged insufficient, I summoned the said defendant to produce before me the said last mentioned books and writings by a day now past,—the service of which summons has been duly proved to me; neither on which day, nor since, has he produced the same, or any of them. Which, &c.

NUMBER 7.

ALLOWANCE OF INTERROGATORIES.

Title.

ON this day of I have allowed and settled the foregoing interrogatories for the examination of A. B. the above defendant; and in testimony thereof, have signed my name hereto.

NUMBER 8.

INTERROGATORIES.

Title.

INTERROGATORIES exhibited by the complainant L. M. before A. B. one of the Masters of the Court of Chancery for the state of New-York, for the examination of the defendant C. D. in pursuance of a decretal order made in this cause, bearing date the day of

First Interrogatory. Have not you, or some and what person on your behalf, received, or possessed parts of the personal estate and effects of

A. B. deceased, not specifically bequeathed, (*and not set forth in your answer in this cause, or the schedules annexed thereto.*) Of what did such personal estate and effects consist? Set forth particularly the separate articles thereof, and the amount of each.

Have not you, or one, and which of you, or some person on your, or one of your behalf, sold or disposed of some parts, and what of such personal estate and effects, and for what price or prices, sum or sums of money? Were such articles sold for their full and utmost value respectively; and at what time, and where, and to whom? What parts or articles of such personal estate remain now unsold, and in whose hands or power are the same respectively? Set forth the particulars of the matters in this interrogatory inquired after to the best of your knowledge, information, remembrance and belief.

Second, Interrogatory. Was or were any debt or debts, sum or sums of money, due or owing from you, or any, and which of you to the said testator, at the time of his death; and whether upon any, and what security or securities, and in whose hands are the same? Is or are the same now due and owing? Answer to this interrogatory fully.

Third, Interrogatory. Have not you, or one, and which of you, or some person on your, or one of your accounts, paid, or allowed certain, and what sums of money, in and towards the funeral expenses, debts, or legacies of the testator A. B., or otherwise on his account? Set forth a true and full account of all such sums of money, with the times when, and persons to whom, the same were respectively paid.

Fourth, Interrogatory. Are, or is there any and what part of such personal estate and effects of the testator, now outstanding, and not got in, or possessed by you, or by any person on your behalf? Why do the same remain outstanding and unreceived? how is the same secured, and from whom, by name, due and owing?

Fifth, Interrogatory. Have all the debts which were due and owing by the testator A. B. at the time of his decease, been paid or satisfied? which of such debts now remain due and owing, and to whom, and for what, and on what security or securities, and of what date or dates respectively? Set forth a full and true account of the matters in these Interrogatories inquired after, to the best of your knowledge, information, remembrance and belief.

C. D. Solicitor, Complainant.

Note. For forms of Interrogatories exhibited to executors, see 1st Turner's Prac. 171. 2d Fowler's Exch. Prac. 288. Equity Draftsman, 508. and Willis' Digest of Interrogatories, 289.

NUMBER 9.

CERTIFICATE OF EXAMINATION NOT BEING BROUGHT
IN.*Title.*

IN pursuance of the decretal order made in this cause, and dated the day of last, I allowed and settled certain Interrogatories exhibited before me on the part of the plaintiffs for the examination of the defendants, touching the inquiries directed by the decree, and indorsed my allowance on an engrossment thereof the day of last ; and on the day of the said defendants were summoned by me to bring in their examination to such Interrogatories on the day of now past ;—of the due service of which summons, proper proof has been laid before me,—neither at which time nor since have the said defendants brought in their answer and examination to such Interrogatories.

Dated this

Which I humbly certify.

NUMBER 10.

FORM OF AN EXAMINATION.

Title.

THE answer and examination of M. C. and C. defendants, to interrogatories exhibited on behalf of A. N. an infant by, &c. complainant, before M. H. one of the Masters of this court, to whom this cause stands referred, pursuant to the decretal order made in this cause, dated the day of

To the first interrogatory these examiners answer and say :

That they did as executors of the last will and testament of J. N. deceased, file an inventory of all the goods, chattels, and credits, which belonged to the said John Nestell deceased, at the time of his death in the office of the Surrogate of the city and county of New York on the twentieth day of December, one thousand, eight hundred and sixteen, that the amount was such as mentioned in the paper marked A. which is a copy of the inventory so filed.

To the second interrogatory, these examiners answer and say, that they have disposed of the property mentioned in the said inventory as stated and set forth in the account book No. I. delivered to the said Master, that they have collected part of the monies, and which part recovered, and the time when, also appear in the said book, and in what manner they have disposed of the same also appears in the said book ;—

said they did sell and dispose of the stock in trade belonging to the said J. N. deceased, mentioned in the said inventory, for the sum, and at the time mentioned in the said account book No. I. upon credit, and secured by the note as mentioned in the said account book, which note they have also delivered up to the said Master. That they have not collected all of the debts mentioned in the said inventory, nor could they collect all on account of the insolvency of the persons from whom due ; such debts as have been collected are also entered in the said book No. I. and the time when they received the same, and the monies received has been disposed of in the manner stated in the said account book No. I. All the property mentioned in the said inventory, which has been disposed of and the time when, is stated and set forth in the said account book, and in what manner the proceeds have been applied is also set forth in the said account book.

To the third interrogatory, these examinants answer and say—That they have not, nor hath either of them since the death of the said J. N., to their or either of their recollection or belief received any personal property of any description whatsoever, other than that mentioned in the said inventory.

To the fourth interrogatory, These examinants answer and say :—

That they have received the rents, issues, and profits arising from the real estate of the said J. N. deceased, and that the amount received and the time when received, are, as the examinants verily believe, truly stated and set forth in the said account book No. I. and in the accounts delivered to the said Master, and from whom the same were received.

To the fifth interrogatory, these examinants answer and say :—

That the said Christian Nestell hath not appropriated to his own use, nor employed in trade or otherwise any part of the monies or property belonging to the said estate of the said J. N. deceased. And they further say, that whatever balance at times, or from time to time remained in the hands of the said M. C. N., he being the acting or principal acting executor was employed occasionally in trade by him, the exact times, or the amount thereof, these examinants cannot with certainty state, but for that must refer to the account as stated in the account book No. I. and to the statement to be made by the said Master.

JURAT.

THE above named Defendants M. C. N. and C. N. were this
Day of sworn before me, that the matters contained in this their
answer and examination, so far as they concerned their own act and deed

were true of their own knowledge ; and that such as concerned the said and deed of any other person or persons they believed to be true.

M. H. Master in Chancery.

NUMBER 11.

CERTIFICATE ON A REFERENCE OF AN EXAMINATION FOR INSUFFICIENCY.

Title.

I HUMBLY certify to this Honorable Court, that under an order of reference on the day of made in this cause, I have been attended by the Solicitors, &c. and have looked into the Interrogatories exhibited by the complainant, and the examination of the defendant *C. D.* thereto, and I find the said examination insufficient.

In not answering fully to the second Interrogatory, that he had set forth a full and true account of all the goods and merchandize referred to therein, and the sales and proceeds thereof ; but in answering only, that he had set forth a full account thereof, so far as the complainant had any legal right therein, or he the examinant was bound to discover the same.

Whereas in my opinion, the said examinant was bound to have positively alleged, he had set forth a full account of the same, or to have stated on what grounds he was not legally bound to set forth a part thereof.

All which, &c. &c.

See *Sharpe v. Sharpe*, 3 John. C. C. 407.

NUMBER 12.

FURTHER EXAMINATION OBJECTING TO ANSWER A CERTAIN INTERROGATORY.

Title.

Caption.

AND as to the interrogatory exhibited by the complainant for the examination of this defendant, whereby he is interrogated, whether during the existence and full force of the articles of partnership therein referred to, divers goods and merchandize, the produce and manufacture of the kingdom of Great Britain, and what goods not by him, or by his pre-

curement, and through his means imported or brought into the City of New York, and did come to his hands or under his control, and were sold by him, or by his direction and when, and the proceeds thereof received by him, or on his account, and what was the amount of such proceeds fully and particularly.

This examinant further answers and says,—That by the well known laws of the United States, all articles the growth or manufacture of the kingdom of Great Britain, were during the time of the existence of the said articles of copartnership, subject to the payment of certain duties for the use of the United States upon being imported or brought within the limits of the same. And this examinant avers and states the truth to be, that in the account already stated, and exhibited by him in the schedules to his former examination, he has set forth, a just, true and full account of all articles of merchandize, the produce or manufacture of Great Britain, imported or brought into the United States, during the operation of such articles by this examinant, or by his procurement, upon which such duties were paid, or secured to be paid. And this examinant avers and insists, that it is well known to the said complainant, and was during the continuance of such articles of Partnership, that no such duties were ever paid upon any such goods and merchandize, brought or imported into the United States by this examinant, or by his procurement, during the existence and force of such articles of partnership, save and except upon the goods and merchandize set forth in the account rendered by him as before mentioned.

And this examinant avers, that if any other such articles of goods and merchandize were during such period, brought or imported, or procured to be brought or imported into the said United States by this examinant, it was with the full knowledge and connivance of the said complainant, at the time of such importation, that the same were so imported and brought in without paying such duties to the United States; and was therefore illegal, and a violation of the laws of the said United States. Wherefore this examinant insists and submits that he is not bound further to answer the said Interrogatory.(a)

(a) I conceive this examination would fairly bring up the question whether under a bill and decree for a general account of partnership transactions, smuggling transactions could be brought into the account. Upon this there are opposite authorities. The true rule appears to me to be, that they could not. See 3 Vesey, 612. 11 Vesey, 168. Tr. Eq. 1. 4. 6. 1 Eden, 378. 381. Eden on Injunctions, 20 n (b) Evans' notes to Pothier, vol. 2. page 2 and 3. 2 Bos. & Pull. 374. 3 Madd. Rep. 111.

It should be noticed that the knowledge of the smuggling by the plaintiff is a material fact. If admitted, the question would come up fairly. If not, the defendant might file Interrogatories to examine him as to it—or it might be apparent from his connection with the business, shewn by the pleadings or evidence.

The time for suing the penalties is supposed to have expired.

APPENDIX.

NUMBER 13.

CERTIFICATE OF NOT ATTENDING TO BE ORALLY EXAMINED.

Title.

I HEREBY certify that under the decretal order of reference made in the above cause, of the day of a summons was duly issued signed by me, whereby the parties, or some one for them, were required to attend at my office in the city of New York on the day of then ensuing; and which summons was underwritten,—“at which time the above defendant C. S. is to be examined upon the matters directed by the said decretal order, to be inquired to.” That due proof under oath of the service of such summons and underwriting upon the said defendant (or the solicitor of the said defendant) on the day of instant, has been laid before me; neither on which said day of (the day fixed for such attendance) nor since has the said C. S. attended before me to be examined. Dated, All which, &c. &c.

NUMBER 14.

ORAL EXAMINATION OF A PARTY.

Title.

THE answer and examination of C. S. the above named defendant, to questions put to him before M. H. one of the Masters of this court, at the city of New York, on the day of pursuant to the decree in the above cause, made the day of

The defendant C. S. being duly sworn, that the matters which should be stated by him on this his examination, so far as they concerned his own act and deed, should be true of his own knowledge, and that what related to the act or deed of any other person or persons should be such as he believed to be true; answers and says,—&c.

Taken, and the above oath administered, by me }
this day of M. H. M. in Ch'y. }

NUMBER 15.

ORAL EXAMINATION OBJECTING TO ANSWER.

Title.

AND this examinant, being interrogated, whether, during the continuance of the said articles of copartnership, divers goods, wares and merchandize, the growth or manufacture of the kingdom of Great Britain, beside, and other than those set forth in the account, &c. were not brought and imported by him, &c. into the United States and sold, &c. (as in No. 12.) answers and says, that in such account he has set forth all the goods so imported upon which duties were paid to the United States according to its laws ; and if any other such goods were imported by him, they were so without paying such duties, which was at the time well known to the complainant, &c. (See No. 12.)

Note. The examination may contain the questions objected to, as is sometimes done on examining witnesses, in the civil law courts. Thus, Being asked, whether, &c. Saith that, &c.

NUMBER 16.

OATH OF PARTY ON ORAL EXAMINATION.

YOU do solemnly swear that the matters which shall be stated by you on this your examination, so far as they concern your own act and deed, shall be true of your own knowledge, and so far as they relate to the act or deed of any other person or persons shall be such as you believe to be true. So help you God.

NUMBER 17.

CERTIFICATE OF INSUFFICIENCY OF AN ORAL EXAMINATION.

Title.

AT the request of the Solicitor of the complainant in this cause, and in presence of the Solicitor of the defendant, (or the defendant not attending, nor any one for him, though duly summoned therefor) I have considered the answer and examination of the above defendant to ques-

APPENDIX.

tions administered to him before me, on the day of Instant;
and I find and certify the same insufficient.

In not sufficiently answering, whether the account rendered by him contained a full and true account of all the goods and merchandize, &c. (as in form No. 11.)

NUMBER 18.

FORM OF A CHARGE.

CHARGE AGAINST AN EXECUTOR.

Title.

THE charge of the plaintiffs against the defendant the executor for the personal estate and effects come to his hands as Executor of L. M. deceased.

The defendant on this account should be charged with :

1st. The several sums of money specified in the credit side of the schedule to his answer annexed, marked A. purporting to be an account between the estate of the said testator, and the said Executor, and at the times specified therein.

2d. The several articles of household furniture of the testator, taken by the defendant to his own use, and at the value affixed to such articles respectively in the inventory of the personal estate filed by the executors, viz,

12 chairs valued at &c.

3d. A bond executed by W. B. to the testator, dated the 5th November, 1816, conditioned for the payment of \$1000 on or before the 5th November, 1817, with the interest.

4th. The amount received by said executor jointly with his co-executor, H. G. from L. M. being the amount of a promissory note given by C. B. to the said testator and for which the said A. B. and the said H. G. joined in a receipt to the said C. B.

And the plaintiffs crave leave to alter and add to this their charge as they may be advised.

B. K. Solicitor for complainant.

NUMBER 19.

CHARGE OF A CREDITOR, UNDER A DECREE.

Title.

THE Charge of *L. M.* a simple contract creditor of *A. B.* deceased the testator in the pleadings named.

The said *L. M.* charges that the said *A. B.* was at the time of his death, justly indebted unto the said *L. M.* upon a promissory note of him the said *A. B.* dated the day of in the sum of payable to the said *L. M.* or order 60 days after the date thereof. And that the whole of the said principal sum is now due to him, and that he hath not any other security for the payment thereof.

Principal of note \$
Interest thereon from the day of
to the day of.

And the said *L. M.* craves leave, &c.

AFFIDAVIT.

L. M. being duly sworn doth depose and say,—That the sum of money stated in the annexed charge of this deponent, as being due to him, by *A. B.* deceased at the time of his death, was justly and fully due to him, at that time, and is now due to him, with the interest, as stated in such charge. And that this deponent hath not any other security for the payment thereof, except the promissory note mentioned in such charge.
Sworn, &c.

NUMBER 20.

STATE OF FACTS ON A REFERENCE TO MAKE IN-
QUIRIES.

W. G. THE complainant insists that upon the refer-
v. ence in this cause before M. H. one of the Masters of
D. H. Jr. this Court to ascertain what would have been the net va-
 lue of the goods in the pleadings mentioned as the pro-
 ceeds of the ten thousand dollars therein also mentioned,

APPENDIX.

if sold for cash at any time between the twenty fifth day of may, one thousand eight hundred and nineteen and the 28th day of June, 1820, or if sold for approved notes on a credit usual or customary in the city of New-York in respect to such goods, that such goods ought to be charged and considered as worth between the dates above mentioned, if sold on the terms above mentioned, respectively as follows—And that they ought to be charged with freight duties, storage, and other necessary and proper charges and expenses as follows, to wit :—

Number of Items.			
No. 1.	Cotton 510950 lbs. 1-9	5977 2-9 at 10 cts.	\$5977,22
2.	Pepper 298064	„ 33118 1-9 at 15½ cts.	5133,30
3.	Coffee 40321	„ 4480 1-9 at 30 cts.	1344,03
Deduct			
4.	Duty on 56772 lbs. Cotton, at 3 cts.	\$1703,16	
5.	„ „ 33118 „ Pepper „ 8 „	2649,44	
	Amount of Duties	- - -	4352,60
6.	Freight 56772 lbs. Cotton, at 3½ cts.	1987,02	
7.	„ 39 tons Pepper and Coffee at \$40	1560,00	
	Amount of freight, &c. &c.	- - -	3547,02

NUMBER 21.

DISCHARGE.

In Chancery.

THE discharge of the defendants W. E. and J. B. for the several sums of money paid, laid out, and expended for or on account of, the estate of W. S. deceased, the testator in the pleadings of this cause named.

1820. Oct.	Paid Mr. B. for sundries for the funeral	-	\$2,50
	Paid I. B. for wages.	-	1,25
	Paid R. E. \$3 for wages and \$1,25, bill for } Sundries.	-	4,25
	Paid I. L. \$2,50 for wages, and \$1,25 for } Sundries.	-	3,70

The defendants pray, that they may alter and add to this their discharge as advised.

NUMBER 22.

SUBPÆNA FOR A WITNESS.

The people of the State of New York, by the grace, &c.

To

WE command you, and firmly enjoin you, and each of you, to be and appear in your proper persons before one of the Masters of our court of Chancery on the day of at o'clock in the noon of that day at his office situate to testify according to your knowledge in a certain cause now depending undetermined in the said court, between complainant, and defendant, on the part of the

And this you are not to omit under the penalty of \$250.

Witness J. Kent, &c. this day of

H. N. 'D. Sol.

E. Elmendorf, Clerk.

TICKET OF SUBPÆNA.

By virtue of a writ of subpœna, issuing out and under the seal of the honourable Court of Chancery of the State of New York, to you directed and herewith shown, you are commanded, and firmly enjoined, to be, and appear in your proper person, before *M. H. Esquire*, one of the Masters of the said court, on the day of at 12 o'clock at noon of the same day, at his office, situate No. Street to testify the truth, according to your knowledge, in a certain cause now depending undetermined in the said court, between

Complainant and
defendant, on the part of the

And this you are not to omit under the penalty of two hundred and fifty dollars.

Dated the

day of

1823.

To

By the Court.

Wm. N. D. Jun.

Solicitor for

Complainant.

APPENDIX.

NUMBER 23.

OATH OF A WITNESS.

YOU solemnly swear that you will true answers make to such questions as shall be asked of you touching the matters in reference in a certain cause, depending in the court of chancery for the State of New York, wherein A. B. is complainant, and C. D. defendant, and therein will speak the truth, the whole truth, and nothing but the truth. So help you God. *Note.*

By uplifted Hand.

You swear by the ever living God that you will, &c. (as above.)

AFFIRMATION OF QUAKER, &c.

You do solemnly, sincerely and truly declare and affirm, that you, &c.

Note. The form of the above oath is taken from that administered by a Master in England previous to the witness being examined by the examiner. *Hind's Prac.* 392.

OATH OF A JEW.

A jew is sworn upon the *Pentateuch*. 1 Vernon, 263. *Tacti libro Legis Mosaicæ*. 2 Hale's Pleas of the Crown, 279. 1 Atkyns, 41.

NUMBER 24.

CERTIFICATE OF A COMMISSION TO EXAMINE BEING NECESSARY.

Sol. Assist. } PURSUANT to the decree made upon the hearing
262. } of this cause, I have been attended by the solicitors of
the several parties in this cause, and have proceeded in stating the account, (or making the inquiries) therein directed. And it having been shewn to my satisfaction by an affidavit laid before me, that A. B. is a material witness for the complainant, without whose testimony he cannot

safely proceed in the reference before me, and that the said A. B. resides (in the county of in this State, or, in the State of or in the kingdom of as the case may be.) I find necessary that a commission should issue, directed to a commissioner therein to be named, empowering him to take the deposition of the said A. B. and such other witnesses as may be produced to him; and do therefore direct, that a commission issue under the seal of this honourable court, for the purpose aforesaid. All which, &c. &c.

In case the course suggested of examining by a Master in our own State, should be adopted, the certificate may be thus. After the words—*I find it necessary*, add “for good cause shewn to me, that the deposition of the said A. B. should be taken before a Master residing in the said county of (upon the interrogatories and cross interrogatories accompanying this certificate) and I do appoint that the same be taken before J. D. a Master of this court, residing in the said county of (of the time and place of the taking of which deposition, let due notice be first given to C. B. Esquire, resident in such county.”) All which, &c.

NUMBER 25.

✓
CAPTION OF DEPOSITIONS.

Title.

DEPOSITIONS of witnesses produced, sworn, and examined in a certain cause depending and at issue in the Court of Chancery of the State of New-York, wherein A. B. is complainant, and C. D. defendant, before M. H. one of the Masters of this court, on the day of 1822 at the city of New-York in the county of New-York, taken under a decree (or order) of the said court, dated the day of 1822; and on the part of the complainant.

NUMBER 26.

ENTRY ON AN ADJOURNED EXAMINATION.

DEPOSITIONS of witnesses produced, sworn, and examined, in the cause, before the Master, and at the place, in the title of these depositions severally named and expressed, on the day of by adjournment.

NUMBER 27.

DEMURRER OF A WITNESS BEFORE A MASTER.

Title.

THE Demurrer of A. B. a witness produced and sworn on the part of the plaintiff, before M. H. one of the Masters of this Court, to whom the above cause stands referred, on the day of

This deponent being interrogated whether or not, a certain promissory note now shewn to him, purporting to be a note drawn by L. M. in favor of B. D. for the sum of \$425, dated the day of and payable in one year therefrom, was not given upon an usurious consideration, and especially whether the consideration of such note, was or was not the sum of \$400 lent and advanced to the said L. M. by the said B. D., and the sum of \$25 added in such note for the use of such \$400 for one year, or for forbearance of the same for such time. And further, if such was not the consideration, what was the consideration thereof,—answers, and says,—that he demurs thereto, and for cause of demurrer avers, that all the information and knowledge, now, or at any time possessed by this deponent, respecting the matters so inquired to, was acquired by this deponent, as Solicitor of the said B. D. since being retained by him to claim such note before the Master to whom this cause stands referred; and that this deponent has not acquired, nor possesses any information whatever respecting such matters from any person or persons, or in any manner whatever, save from the communications of his client the said B. D. made to him in consequence, and in the course of his professional employment before stated. And therefore this deponent submits to the judgment of the court, whether he shall make any further answer in the premises.

Cutts v. Pickering, Ventris, 197. See the demurrer in Parkhurst v. Lowten, 3 Mad. Rep. 121, and Morgan v. Shaw, 4 Ibid. 54, and Parkhurst v. Lowten, 2 Swanston, 194.

NUMBER 28.

REPORT ON A BILL FOR REDEMPTION.

In Chancery.

R. R. B. and others

v.

J. McV. and others.

Report.

To the Honorable James Kent, Chancellor of the State of New-York.

IN pursuance of a decretal order of this Honorable Court, made in the above cause, and dated the first day of January, 1821, I the subscriber one of the Masters of this Court, residing in the city of New-York, having been attended at several times by counsel for the complainants, and for the defendants, and having examined the evidence taken in chief in this cause, and taken the testimony of several witnesses produced before me, upon the matters directed to be inquired into by such order, and considered the same, I do report :—

That I have stated the account of the amounts due upon the two several bonds and mortgages mentioned in the said decree, and of the rents and profits of the mortgaged premises, since the 15th March, 1803, received by the defendant Wm. G. D. or which with ordinary care and diligence might have been received by him, the particulars and items of which accounts appear in Schedule A hereunto annexed and making part of this report.

That in computing the amount due upon the said bonds and mortgages I have stopped the interest, upon the 11th March 1803, the day of the tender made by some of the complainants to G. D., of the amount then due upon the said mortgages ; conceiving that such tender was strictly made, and that the defendant had no reasonable cause, for refusing to admit the redemption sought.

And I further report, that the complainants have claimed for rent of the premises, since the 1st April, 1809 the annual sum of \$75,—that the amount actually received has been the sum of \$70 annually, from Asa Matherson tenant in possession since that period. That it appears from the testimony of B. McV. that in April, 1809, he gave up the premises, but not being able to procure another place, offered to said W. G.

D. \$75 a year rent, to allow him to remain. That the premises were then let, or contracted to be let to A. M., and that said D. stated he would try to let him the said McVeagh have them at the sum offered, and afterwards, that he was unable to do it, on account of his bargain with M.—That the first lease to said M. was for the period of three years; and that it does not appear, that the said McV. or any other person, at any subsequent time renewed the offer of \$75 or any other sum beyond the said sum of \$70 rent actually received. Nor that any application was ever made to the said McVeagh or to any other person by said W. G. D. to take the premises at the said rent of \$75 or any other advance. That from a consideration of the testimony upon that point, I am of opinion the sum of \$70 was a fair and adequate rent for the premises, at that period, and has so remained to the present time.—And that under these circumstances, I have disallowed the claim of the said Complainants; not conceiving this a case in which a mortgagee in possession should be charged beyond the amount actually received on the ground of wilful default, or defect of diligence.

And as to such part of the decree as directs an account to be taken of the injury, waste, or deterioration of the mortgaged premises, or in the value thereof, by W. G. D. or by those under him, I report;—

That I have taken the rule of the court to be that a mortgagee in possession is in Equity chargeable only for waste, technically so called, or wilful neglect, producing an injury and deterioration of the premises, but is not liable for a diminution of value, which may be accounted for by the lapse of time merely. And I find, that the premises were, in the month of March, 1803, at the commencement of the possession of the said W. G. D. in about the same situation as to fences and buildings, as at present. That a considerable quantity of timber, young, and old, was at that period upon the premises. That the whole of such timber has been cut down, and that the place is now entirely destitute of wood. But I find from the testimony of several witnesses, that the quantity of wood upon the place would not have been sufficient to supply the ordinary consumption for fire wood and repairs.—That the young timber could not have been preserved, if fire wood was taken from the premises, and that a considerable quantity of wood has been taken from other pieces of land belonging to said W. G. D. for the consumption of the place, by his permission; under these circumstances, I have found no reason to charge the said defendant with any sum of money on the ground of such destruction of the wood, nor, in my opinion, does the testimony supply any ground to charge the defendants by reason of any improper cultivation, or undue exhaustion of the farm.

And as to such part of the decree as directs the master to take an account of the value of the beneficial and permanent improvements, now existing, if any, which the said W. G. D. hath caused to be made upon the said mortgaged premises, I report:—

That I have taken the rules of the court to be, that additional permanent improvements upon the premises, made by a Mortgagee in possession, shall be paid for only by their value at the time of the redelivery of possession, but that he shall be allowed the actual costs of necessary repairs, whatever may be the existing value of the subject upon which they were made,—That the allowance of the same is to be determined by their necessity for the preservation of the premises in the same condition, or the producing of the rent charged to the mortgagee.

And further, that I have not considered the omission of the decree to provide for an allowance for necessary repairs, as precluding me from making it, according to their cost.

And having examined the testimony as to the expenditures of the said W. G. D. and work performed by him upon the premises, with a view to these rules, I find—that an early period of the possession of B. McV. as tenant of said D. and as it appears during the first year, the said D. employed said McV. to build about fifty rod of stone fence, upon the premises, and allowed him fifty cents a rod for the same, and that the amount was credited upon the rent payable by said McV. that such price allowed appears to have been reasonable. That at that time, the fences were in a decayed condition, and that such piece of stone fence, is at the present time considerably sunken and out of repair, and the premises as to fences, are in about the same repair, as when McV. took possession,—that consequently the allowance, if any, which could be made for the same, by its existing value, as a permanent improvement would be very trifling—but that I have considered the same as a necessary expense for the repair of the premises ; and as a cause of the increase of rent afterwards received and actually charged, and have therefore allowed the same.

And I further find,—That during the first three years the possession of A. M., as tenant of said D., after J. McV. ; and as it appears during the second year of such possession, the said D. built a small piece of stone wall upon the premises, stated by A. M. to have been between ten and twenty rod, and the cost of which was about the sum of five shillings a rod ;—that the same is now out of repair, and in a decayed condition ; but that I have allowed its actual cost, conceiving it a necessary repair.

And further, that it appears, that the said A. M. has advanced the money for the payment of taxes upon the premises, and receipts are taken to himself. That he has stated in his testimony in chief, that he is to be allowed for the same by W. G. D., the leases to him not containing any covenant for the payment of the same by himself, and that there is an unsettled account between himself and said Denniston,—and that I have allowed the amount of such taxes to said D., so far as any proof of payment has been produced to me.

And I further report, that I have considered the defendant W. G. D., previous to the 1st April, 1811, as a creditor, by the bonds and mort-

gages held by him, and by his disbursements on the premises, receiving partial payments in liquidation of his claim, by means of the rents and profits,—that I have not allowed interest upon the rents up to that time, nor upon the disbursements of the defendant W. G. D. ; and interest upon the bonds and mortgages being stopped previous to the commencement of the reception of the rents, such partial payments have gone in extinction of a dead sum ; and therefore I have not found it necessary to make any rest in the account, before such last mentioned date.

And I find that on the said first day of April, 1811, the total of the rents received had fully discharged the total amount in any manner due to the said W. G. D., according to the allowances made by me, and that there was a balance then in his hands of \$19,50. That from that time I have considered the said defendant W. G. D. as becoming a naked trustee, retaining monies in his hands, which the complainants were entitled to receive, and therefore chargeable with interest on his annual balances. And I have stated the residue of the account with annual rests, and in schedule B., to this report annexed, have stated an account of interest upon the annual balances, the total amount of which balances is the sum of \$627,22 cents, and of interest \$322, making together the sum of \$849,22, which sum I report chargeable to the defendant W. G. D.

All which I respectfully submit.

NUMBER 29.

OBJECTIONS TO DRAFT OF MASTER'S REPORT.

In Chancery.

W. G. D. and others
adj.

R. R. B. and others.

} **OBJECTIONS** taken by the defendants to the draft of the report in this cause, prepared by M. H. Esq. the Master to whom this cause stands referred.

1st OBJECTION.—For that in the computation of the interest due upon the bonds and mortgages mentioned in the report, the Master has stopped the interest on the 11th day of March, 1809, which ought to have been allowed to this time according to the decree, and at the same time the Master has charged the defendant W. G. D. with the whole rents and profits of the premises in question down the time of making his report.

2d. For that an allowance ought to have been made to the defendant W. G. D. for the value of the fire wood furnished by him to the tenants

in possession, or a deduction on that account ought to have been made from the rents with which he is charged by the said report.

3d. For that allowance ought to have been made for a greater quantity of stone fence built on the premises, and for rails brought thereon from other premises or procured by the defendant W. G. D. according to the evidence before the Master.

4th. For that the defendant W. G. D. is charged by the report with interest on the annual balances of the monies received, or which are charged to him for what he might have received for the said rents, when in fact such rents have not been annually received, and if so calculated, compound interest will in effect be charged against him, when at the same time no interest whatever is allowed on the debt or demands due on the said bonds and mortgages after the 11th. day of March, 1803, and also for that no interest is allowed on the sums credited to the said W. G. D. for the additional building, and the stone wall, and other fences, and improvements made or caused to be made by him on the premises.

J. R. Sol.

These objections were turned into exceptions, and overruled, November term, 1822.

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NUMBER 31.

ACCOUNT in *Nestell v Nestell*, Credits being applied at every period when they exceeded the interest then due, in extinguishing principal:—Commencing one year from Testator's death.

		Principal.		Time Days.	Interest	
1816						
Sept. 1.	Debits this year per Schedule A	3810	67			
" "	Credits " " " " B	1707	86			
		2102	81	52	20	97
" 12	Debit - - - - -	277	31	40	2	13
	Interest - - - - -	23	10		23	10
		2403	22			
Oct. 22.	By Credit this day - -	62	00			
	Balance due - - - - -	2341	22	76	34	12
Nov. 1.	Debit - - - - -	119	16	67	1	53
	Interest - - - - -	35	65		35	65
		2496	03			
1817						
Jan. 6.	By further credits - - -	55	50			
	Balance due - - - - -	2440	53	65	30	42
Mar. 12.	Interest - - - - -	80	42			
		2470	96			
Mar. 12.	By further credits - - -	143	37			
	Balance due - - - - -	2327	59	49	21	88
April 15.	To debit - - - - -	110	00	15		31
" 30.	Interest - - - - -	22	19		22	19
		2459	78			
" 30.	By credit - - - - -	210	00			
	Balance due - - - - -	2249	78	342	147	55
May 1.	To debit - - - - -	45	62	341	2	98
Aug. 1.	" do. - - - - -	118	75	249	5	67
Nov. 1.	" do. - - - - -	130	99	157	3	93
1818. Feb. 1.	" do. - - - - -	101	47	65	1	26
	Interest - - - - -	161	41		161	41
	Carried over	2808	02			

April 7.	Brought over	-	-	-	2808	02			
"	By Credits	-	-	-	260	00			
"	Balance due	-	-	-	2548	02	29	14	17
May 6.	Interest	-	-	-	14	17			
"	By Credit	-	-	-	2562	19			
"	To balance	-	-	-	50	00	37	17	83
June 12.	Interest	-	-	-	2512	19			
"	Credit	-	-	-	17	83			
"	Balance	-	-	-	2530	02	10	4	75
22.	Interest	-	-	-	58	00			
"	Credits	-	-	-	247 2	02			
Aug. 25.	To balance	-	-	-	4	75			
Nov. 17.	" Debit	-	-	-	2476	77	291	134	92
1819	" do.	-	-	-	59	00	227	9	16
Jan. 2.	" do.	-	-	-	2417	77	143	4	00
Feb. 1.	" do.	-	-	-	210	30	97	6	08
April 9.	Interest	-	-	-	145	52	67	1	91
"	By Credits	-	-	-	327	00			
May 1.	Balance	-	-	-	148	92			
Aug. 1.	do.	-	-	-	155	07		156	07
Nov. 1.	do.	-	-	-	3405	58			
1820	do.	-	-	-	360	00			
Feb. 1.	do.	-	-	-	3045	58	1 yr. 1	213	77
April 10.	Interest	-	-	-	136	11	344	8	97
"	By Credits	-	-	-	136	11	252	6	57
May 1.	To Balance	-	-	-	136	11	160	4	18
6.	Interest	-	-	-	136	11	68	1	77
	Carried up	-	-	-	235	26		235	26
		-	-	-	3825	28			
		-	-	-	336	18			
		-	-	-	3489	10	26	17	39
		-	-	-	136	11	5		13
		-	-	-	17	52		17	52
		-	-	-	3642	73			

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May 6.	Brought up	-	-	-	3642	73			
	By Credit	-	-	-	50	00			
Aug. 1.	Balance	-	-	-	3592	73	117	80	62
	Debit	-	-	-	136	11	31		80
Sept. 1.	Interest	-	-	-	81	42		81	42
Aug. 5.	By Credit	-	-	-	3810	26			
		-	-	-	30	00			
Sept. 1.	Balance due	-	-	-	33780	26			

NUMBER 32.

THE same Account stated with a quarter yearly rents to deduct the excess from the Principal.

1816		Principal	Time	Interest	1816		
Sept. 1.	To debits pr schedule A	3810 67	Days		Sept. 1.	By Credits pr schedule B	1707 86
	„ Balance	2102 81	91	36 69		Balance	2102 81
12.	„ Debit	277 31	79	4 20			3810 67
Nov. 1.	„ Do.	119 16	30	68	Dec. 1.	„ Credits this quarter	62 00
		41 57		41 57		Balance	2478 85
		2540 85					2540 85
Dec. 1.	„ Balance	2478 85	90	42 78	1817	„ Credits this quarter	58 87
	„ Interest	42 78			Mar. 1.	Balance	2462 76
		2521 63					2521 63
1817							
Mar. 1.	„ Balance	2462 76	92	46	June 1.	„ Credits this quarter	350 00
April 15.	„ Debit	110 00	46	43 97		Balance	2313 08
May 1.	„ Do.	45 62	31	27			
	Interest	44 70		44 70			
		2663 08					2663 08

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					1817					
1817	Sept. 1.	By credits this								
June 1.	To Balance	2313 08	365 161 91		Dec. 1.	" Do. Do.	00 00			
Aug. 1.	" Debit	118 75	304 6 92		1818	" Do. Do.	50 00			
Nov. 1.	" Do.	130 99	212 5 32		Mar. 1.	" Do. Do.	00 00			
1818					June 1.	" Do. Do.	260 00			
Feb. 1.	" Do.	101 47	120 2 33			Balance	2530 77			
	Interest	176 48	176 48				2840 77			
		2840 77								
June 1.	" Balance	2530 77	92 44 65		Sept. 1.	" Credits this				
Aug. 25.	" Debit	210 30	6 24			quarter	117 00			
					"	" Balance	2668 96			
Sept. 1.	" Interest	44 89	44 89							
		2785 96					2785 96			
"	" Balance	2668 96	273 139 77		Dec. 1.	" Credits this				
Nov. 17.	" Debit	145 52	195 5 43		1819	quarter	00 00			
1819					Mar. 1.	" Do. Do.	00 00			
Jan. 1.	" Do.	327 00	149 9 34		June 1.	" Do. Do.	360 00			
Feb. 1.	" Do.	148 92	120 3 42			" Balance	3225 27			
May 1.	" Do.	136 11	31 80							
June 1.	" Interest	158 76	158 76							
		3585 27			Sept. 1.	" Credits this				
Aug. "	" Balance	3225 27	365 225 76			quarter	00 00			
Aug. 1.	" Debit	136 11	304 7 93		Dec. 1.	" Do. Do.	9 31			
Nov. 1.	" Do.	136 11	212 5 53		1820	" Do. Do.	100 00			
1820					Mar. 1.	" Do. Do.	276 87			
Feb. 1.	" Do.	136 11	120 3 13		June 1.	" Do. Do.	3626 68			
May 1.	" Do.	136 11	31 80			Balance				
June 1.	" Interest	243 15	243 15							
		4012 86					4012 86			
Aug. "	Balance	3626 68	92 63 99		Sept. 1.	" Credits	30 00			
Aug. 1.	Debits	136 11	31 80		"	" Balance	3797 58			
	Interest	64 79	64 79							
		3827 58	817 12				3827 85			
Sept. 1.	Balance due	3797 58								

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NUMBER 33.

The same account with Interest upon the yearly balances.

			Principal	Interest
1816	Sept. 1.	To balance due - - -	2102 81	
		„ Interest 4 years - - -		588 75
1817	Sept. 1.	„ balance this year - - -	199 97	
		„ Interest 3 years - - -		41 96
1818	Sept. 1.	„ balance this year - - -	15 76	
		„ Interest 2 years - - -		2 20
1819	Sept. 1.	„ balance this year - - -	533 66	
		„ Interest 1 year - - -		37 35
1820	Sept. 1.	„ balance this year - - -	128 26	
			2980 46	
		Whole Interest - - -	670 26	
		Total due - - -	\$ 8650 72	

NUMBER 34.

The same Account compounding the Interest.

			Principal	Interest
1816.	Sept. 1.	To balance due - - -	2102 81	147 19
1817.	Sept. 1.	„ Interest one year - - -	147 19	
	„	„ Balance this year - - -	199 97	
		Amount due - - -	2449 97	171 49
1818.	Sept. 1.	„ Interest one year - - -	171 49	
	„	„ Balance this year - - -	15 76	
		Amount due - - -	2637 22	184 60
1819.	Sept. 1.	„ Interest one year - - -	184 60	
	„	„ Balance this year - - -	533 66	
		Amount due - - -	3355 48	234 88
1820.	Sept. 1.	„ Interest one year - - -	234 88	738 16
	„	„ Balance this year - - -	128 26	
			\$3718 62	

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NUMBER 35.

The same account, computing Compound Interest by the scale, No. 36.

					Years		
\$2102	81	at 7 77-100 per cent	-	-	4	\$653	51
199	97	at 7 50-100 " "	-	-	3	44	39
15	76	at 7 24½-100 " "	-	-	2	2	29
533	66	at 7 " "	-	-	1	37	35
128	26						
						738	14
\$2980	46						
738	14						
\$3718	60						

NUMBER 36.

A scale of the gain by compounding Interest, for each of twenty years, and the annual per centage.

Sum	Year	Simple Interest	Compound Interest	Gain by Compound	Yearly Average	Per centage
\$ 100	1	107	107			
"	2	114	114 49	49	24½	7 24½-100
"	3	121	122 50	1 50	50	7 50-100
"	4	128	131 07½	3 07½	77	7 77-100
"	5	135	140 24½	5 24½	1 05	8 05-100
"	6	142	150 05	8 05	1 34	8 34-100
"	7	149	160 55	11 55	1 65	8 65-100
"	8	156	171 78	15 78	1 97	8 97-100
"	9	163	183 80	20 80	2 31	9 31-100
"	10	170	196 66	26 66	2 66	9 66-100
"	11	177	210 42	33 42½	3 04	10 04-100
"	12	184	225 15	41 15	3 43	10 43-100
"	13	191	240 91	49 91	3 84	10 84-100
"	14	198	257 77	59 77	4 27	11 27-100
"	15	205	275 81	70 81	4 72	11 72-100
"	16	212	295 11	83 11	5 19	12 19-100
"	17	219	315 76	96 76	5 69	12 69-100
"	18	226	337 86	111 86	6 21	13 21-100
"	19	233	361 51	128 51	6 76	13 76-100
"	20	240	386 81	146 81	7 34	14 34-100

NUMBER 37.

STATE OF FACTS AND PROPOSAL FOR THE APPOINTMENT OF A GUARDIAN.

IN the matter of the }
 Guardianship of A. B. an Infant. }

THE state of facts and proposal of C. D. for his appointment of guardian of the estate and person of A. B. the Infant,—Sheweth :—

That the above named A. B. is an infant under the age of 21 years, a wit, of the age of 13 years, and about 5 months.

That C. D. is uncle of the said infant by his father's side, and E. F. and G. H. are uncles of the said infant by the mother's side, and that the said infant has no other relations who would be entitled to a distributive share of his personal estate, if he were dead intestate.(a)

That the estate of the infant consists of a house and lot of ground situate in the city of New York, estimated to be worth the sum of \$10,000, and yielding an annual rent \$600, which real estate has descended upon the said infant, as heir at law of his father J. B. who died without devising the same.

That the said infant is also entitled to the sum of \$3000 stock of the Bank of New York standing on the books of the said Bank, in the name of his said Father who died intestate, and that the above stated comprise all the real and personal Estate of the said Infant.

The said C. D. proposes himself to be the guardian of the person and estate of the said Infant, and G. H. of the City of New York Merchant, and I. K. of the same place Grocer as his sureties, and that the bond to be taken for the faithful discharge of his duties be in the sum of \$

And the said C. D. craves leave to alter or add to this state of *Facts* and proposal, as he may be advised.

AFFIDAVIT.

State of New York ss. C. D. of the City of New York, Merchant, being duly sworn, saith, that the matters set forth in the foregoing state of facts are true to the best of his knowledge and belief.

Sworn, &c. &c.

(a) This is the general legal construction of the Term *Relations*. 1 Atk. 469.

NUMBER 38.

AFFIDAVIT OF SURETIES.

STATE of New York ss. G. H. of the city of New York, Merchant, and J. K. of the same place, Grocer, being duly sworn, make oath and say,—and first the said G. H. saith, that he is fully and truly worth the sum of \$ over and above all incumbrances and just debts paid. And the said J. K. for himself saith, that he is worth the sum of \$ over and above all incumbrances and just debts paid.

Sworn, &c. &c.

NUMBER 30.

REPORT.

Title.

To the Honorable, &c. &c.

IN pursuance of the 44th general rule of this Honourable Court, C. D. of the City of New York hath applied to me, one of the Masters of this court, to ascertain and report upon the matters by the said rule directed to be ascertained, previous to the presenting of a petition for the appointment of a Guardian of the person and estate of the above named Infant; upon which, I report,—that the said A. B. is an infant of the age of (15 years and 5 months;)—(and did before me upon a private examination freely nominate and consent to the appointment of the said C. D. as the Guardian of his person and estate.)

(That the Relations of the said Infant are the said C. D. an Uncle by the Father's side, and E. F. and G. H. Uncles by the Mother's side.)

That the said infant is seized of or well entitled to real estate of the value of \$10,000, and yielding an annual Income of \$600, and that such estate consists of, &c. &c.

That the said Infant is also entitled to personal estate of the value of \$5000 consisting of, &c. &c.

The total annual income of the estate of the said infant is about the sum of \$950.

That the said C. D. proposed as guardian of the said Infant is a resident of the City of New York; a man of family, and of general repute, both as to circumstances and integrity, as appears by the testimony of witnesses examined before me; (and that the said infant has been proper-

ly treated and educated by the said C. D. since the death of such infant's father) I have for the reasons aforesaid, approved of said C. D. to be appointed the Guardian of the person and estate of the Infant. And I have examined G. H. and I. K. proposed as sureties of the said C. D. as to their sufficiency (or, an affidavit of G. H. and I. K. proposed as sureties, of the said C. D. as to their sufficiency has been laid before me,) and I find them proper and competent persons to be such sureties, and I am of opinion that the bond to be given by the said C. D. together with the said G. H. and I. K., as his sureties, be in the sum of \$10,000.

All which, &c. &c.

NUMBER 40.

PETITION FOR APPOINTMENT.

In the Matter of the Guardianship }
of A. B. an Infant.

To the Honorable, &c. &c.

The Petition of, &c. &c. &c.

THAT the above named A. B. is an infant under the age of 16 years and your petitioner is desirous of being appointed guardian of his person and estate.

That your petitioner has procured a report (accompanying this petition and to which he refers,) from M. H. one of the Masters of this Court, setting forth the amount of estate real and personal of such Infant, the annual value of his real estate, his age, and other material matters; and approving of your petitioner as Guardian of such infant, and of G. H. and I. K. of the City of New York as his sureties; and fixing the sum in which security should be given by your petitioner and his sureties at \$

Your petitioner therefore prays, that he may, by order of this court, be appointed the Guardian of the person, and estate of the said A. B. the infant upon his executing, together with his said sureties, a bond in the usual form in the said sum of \$ to be approved of by one of the Masters of the court, and filed with the Assistant Register thereof.

NUMBER 41.

BOND OF GUARDIAN.

KNOW all Men by these Presents, that we A. B. of the city of New York, Merchant, and C. D. of the same place, Gentleman, are held and-firmly bound unto E. F. of the same place, an Infant under the age of 21 years, in the penal sum of \$ to be paid to the said E. F. his heirs, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, &c. &c.

Whereas by an order of the court of chancery of the state of New York, entered the day of in the matter of E. F. an Infant, the above bounden A. B. was appointed a guardian of the above named E. F. an infant as aforesaid, to have the care and custody of the said Infant, and the management of his estate.

Now therefore the condition of this obligation is such, that if the above bounden A. B. shall and do faithfully and justly perform his trust as such Guardian, and duly observe such orders, as the chancellor shall make in the premises in relation to such trusts, then this obligation to be void, otherwise of full force and effect.

NUMBER 42.

REPORT ON REFERENCE AS TO INFANT TRUSTEE OR MORTGAGEE.

Ex parte G. H.
In the matter of A. B.
an infant Trustee.

REPORT.

To the Honorable, &c. &c.

THAT by a deed of bargain and sale dated 1st June 1819, C. D. late of the City of New York, for the consideration of one dollar paid to him as therein mentioned, granted, bargained, and sold unto E. F. late of the same place, his heirs, and assigns certain messuages and parcels of land, situate in the city of New York, and state of New York, and therein mentioned and described in trust to sell the same and out of

the proceeds to pay certain creditors of the said C. D. therein named and specified, the sums therein mentioned, and if any part of such premises remained unsold after the execution of such trusts, to re-convey such part to the said C. D. his heirs or assigns, or to such person or persons, as he by instrument under seal in his life time, or by his last will and testament shall direct ; which deed of bargain and sale was duly recorded in the office of, &c. &c.

And I further report, that on the 25 day of June 1820, the said C. D. departed this life, having first made and duly executed, and published his last will and testament, dated the 1 May 1820 in due form to pass real estate, whereby after reciting the aforesaid deed and its trusts, and that all the debts, mentioned and intended to be secured therein had been fully paid and satisfied, except the sum of \$500 due and owing to L. M. of &c. and which debt would be speedily paid off by the proceeds of a lot of land, parcel of such conveyed premises theretofore sold, and also reciting that certain parcels of such premises remained unsold, did will, direct, and appoint, that the said C. D. should convey all such remaining lots and parcels, to G. H. of the city of New York, and did thereby give and devise the same, and all his right, title, and interest therein, to the said G. H. in fee simple.

And I further report, that I have received sufficient proof of the full discharge or release of all the debts specified in such deed of trust, and secured to be paid thereby, having inspected vouchers therefor, and been attended by several of such creditors, and received their admission of such payment, and taken strict proof of such payment, or satisfaction in cases in which the creditor did not attend before me.(a)

And further, that on the 10 day of August 1820, the said E. F. departed this life without leaving a will, and leaving A. B. his only child and heir at law ; and without having conveyed the remainder of such parcels of land to the said G. H. as directed by the will of the said C. D. to do.

That the said A. B. is an Infant of the age of 16 years and 5 months.

That the parcels of land and Messuages so remaining unsold are known and described in the said deed of trust as follows, to wit—All &c. &c.

And I find that the said A. B. is an infant trustee of such last described premises remaining unsold, within the intent and meaning of the act of the Legislature of the State of New York, entitled an act concerning Ideots, Lunatics and Infant Trustees, and that such remaining parcels of land ought to be conveyed to G. H. of the city of New York, before named, All which, &c.

(a) The finding of the Infant a trustee in this case depends upon the debts being paid, otherwise he would have a duty to perform. Therefore the Master should be particular as to that fact. See *ex parte Finten*, 3 Vesey and Beames, 149.

See a report minutely stated in Attorney General *v* Pomfret : 1 Cox's Cases.—For a report where the infant is heir of a mortgage, See 2 Fowler's Ex. Pr. 432. recited in an order.

NUMBER 43.

STATE OF FACTS AND PROPOSAL ON APPROVAL OF THE
COMMITTEE OF A LUNATIC.*Title.*

The state of facts and proposal of A. B. upon the reference to M. H. one of the Masters of this court, for the approval of a committee of the person and estate of C. D. a lunatic.

THAT the above named A. B. the petitioner is brother of the lunatic, and of the age of years. That M. D. the wife of the lunatic, is living, and that he has three children, and no more living, viz. W. S. and B. all of whom are minors; that the lunatic has also a sister living married to W. H.

That the estate of the said lunatic consists of—(set out estate shortly, situation, value, and yearly income, distinguishing real and personal.)

And the said A. B. proposes himself as committee of the estate of the said lunatic, and himself together with the said M. D. wife of the lunatic to be the committee of his person; and he further proposes J. L. and M. R. of, &c. &c. to be his sureties as the committee of the lunatic's estate.

AFFIDAVIT.

A. B. of, &c. being sworn, saith that the matters of fact set forth in the above state of facts are true.

Sworn, &c. &c.

NUMBER 44.

AFFIDAVIT SURETIES.

STATE of New York ss. J. L. of, &c. and M. R. of, &c. being duly sworn, make oath and say:—And first the said J. L. for himself saith, that he is truly and fully worth the sum of \$ over and above all just debts paid, and the said M. R. for himself saith, that he is worth truly and fully the sum of \$ after all just debts paid.

NUMBER 45.

REPORT OF APPROVAL COMMITTEE.

n the matter of L. M. }
a Lunatic.

To the Honorable, &c.

IN pursuance of, &c. I the subscriber, &c. &c. do certify that I have been attended by the solicitor of A. B. brother of the above named lunatic, and by the solicitor of C. D. wife of the said lunatic, and of E. F., &c. that the said C. D. wife of the lunatic, and the said E. F. were proposed as proper persons to be appointed committees of the person of the said lunatic. That I have considered the said proposal, and found (by affidavits laid before me,) or (by witnesses examined by me) that the said A. B. is the brother of the said lunatic; that the said lunatic has no children, nor the issue of any children, living, that he has not any other next of kin, but his brother the said E. B. and another brother D. B., and that no objection having been made to the said proposal by, or on behalf of any of the parties before mentioned, I have approved of the said C. D. and E. F. as fit and proper persons to be appointed committees of the said lunatic's person.

And I further report, that the said A. B. has been proposed the committee of the estate of the said lunatic, and having examined witnesses as to the character of the said A. B. and capacity to conduct business, and no objections being made to his appointment, I am of opinion that the said C. D. is the most fit and proper person to be appointed the committee of the estate of the said lunatic.

And I further report, that L. M. of, &c. and N. O. of, &c. have been proposed before me as sureties of the said committee, and their several affidavits in support of their sufficiency have been laid before me; and that I have approved of the said L. M. and N. O. as sureties of the said committee, and think proper that the amount of the security to be given by the said committee, and his said sureties should be the sum of \$
All which, &c. &c.

Note. If there are various claimants, the proposal of each should be stated in the report; with either a summary of the evidence as to the qualifications of each, laid before him, (which is the English practice) or, the Master may refer to the affidavits laid before him in their support; and in his discretion annex copies. If it is intended to contest his decision, this will be proper.

NUMBER 46.

RECOGNIZANCE.

KNOW all men by these presents, that we A. B., C. D. and E. F., all of the city, county and state of New York, are held and firmly bound to the people of the state of New York, in the sum of _____ dollars lawful money of the United States of America, to be paid unto the said people; for which payment, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated the _____ day of _____ in the year of our Lord one thousand eight hundred and eighteen.

Whereas, by an order of the Chancellor of the State of New York, the above named A. B. hath been appointed guardian and committee of the person and estate of _____ a lunatic.

Now, the condition of this obligation is such, that if the said A. B. shall well and faithfully perform the trust and office of guardian, and committee of the person and estate, real and personal of the said lunatic, and shall account to the Court of Chancery of the State of New York, according to law, then this obligation to be void; else to remain in full force and virtue.

Sealed and delivered
in the presence of
G. H. and I. J. }

A. B.
C. D.
E. F.

MASTER'S CERTIFICATE.

I certify, that in pursuance of an order of the honorable court of Chancery of the State of New York, made on the _____ day of _____ Inst. I have perused the within bond, and do approve of the same.

Dated the _____ day of _____ in the year of our Lord, 1818.
J. H. Master in Chancery.

NUMBER 47.

STATE OF FACTS AND PROPOSAL ON APPOINTMENT OF A RECEIVER.

Title.

A. B. the plaintiff proposes T. L. of, &c. to be the receiver of the rents and profits of the estates in the pleadings in this cause men-

tioned, (or) of the claims, demands, produce, interest, dividends, and other outstanding property in the pleadings, &c. and the said T. L. proposes G. B. and M. B. of &c. to be his sureties.

The lands, tenements, and premises, and the personal estate in the pleadings in this cause mentioned, and whereof a receiver is directed to be appointed, are as follows, to wit. A certain farm or piece of land, situate in the county of _____ State of New York, consisting of 200 acres of land, and let at the yearly rent of \$200, or of the estimated value of \$2000, of a certain bond executed by, &c. &c.

AFFIDAVIT.

A. B. of, &c. being sworn, &c. saith, that the several pieces or parcels of land, tenements, and items of personal estate, contained and set forth in the annexed state of facts, is in all respects a full and true statement of the lands, tenements, hereditaments, and personal estate in the pleadings in this cause mentioned, and whereof a receiver is directed to be appointed and the value, income, rent, profit, interest, or produce of the same.

NUMBER 48.

AFFIDAVIT OF SURETIES.

Title.

W. C. of, &c. and T. V. of, &c. severally make oath and say; and first, this deponent W. C. for himself, saith, that he is worth the sum of £2000, (double the amount of the yearly rent of the estates) after all his debts are paid. And this deponent T. V. for himself saith, that he is worth the sum of £2000, (as before) after all his debts are paid.

NUMBER 49.

REPORT RECEIVER.

Title.

THAT the said (compls.) have proposed before me, A. B. of, &c. to be the receiver of the Estates in question in this cause, and E. F. and G.

H. of, &c. to be his sureties. That having considered the same, and received testimony as to the sufficiency of the proposed sureties, I did approve of the said proposal.

That a recognizance in the sum of \$ duly to account for what the said receiver shall receive, has been allowed by me, and entered into by the said A. B. and the said C. D. and E. F. as his sureties, and that therefore I have appointed, and do appoint the said A. B. the receiver of the estates in question in this cause.

All which, &c.

NUMBER 50.

RECOGNIZANCE OF RECEIVER.

KNOW all men by these presents that we A. B. and C. D. all of the city, county and state of New York, are held and firmly bound to the people of the state of New York in the sum of dollars, lawful money of the United States of America; to be paid to the said people; for which payment, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated the day of in the year of our Lord one thousand eight hundred and

Whereas, by an order of the Court of Chancery for the state of New York, made on the day of in a certain cause therein depending, wherein L. M. is complainant and N. O. defendant, the above named A. B. was appointed receiver of all and singular the rents, issues, and profits of the real estates in question in this cause. (*If personal estate add,—and of the produce, interest and avails of the personal estate in question in this cause.*)

Now the condition of this obligation is such, that if the said A. B. shall well and faithfully perform the trust and office of receiver of the estate in question in the above cause, and shall account to the Court of Chancery for the state of New York, according to law, then this obligation to be void; else to remain in full force and virtue.

Sealed and delivered }
in the presence of }
G. H. and I. J. }

A. B.
C. D.

NUMBER 51.

AFFIDAVIT OF COMMITTEE ON PASSING ACCOUNTS.

In the matter of C. }
 D. a lunatic. }

State of New York, and county of New York, ss.

A. B. committee of the person and estate of the said C. D. the lunatic, maketh oath and saith, that the account hereto annexed, marked A. doth contain to the best of this deponent's knowledge and belief, a just and true account of all such sum and sums of money, as have been received by this deponent, or any other person or persons by his order, or for his use, out of, or on account of the said lunatic's estate, from the day of (from the time of appointment, or of last passing his account) and that this deponent hath not within such period, received any other or further sum of money, out of, or on account of the said estate, than what are set forth in such account. And this deponent further saith, that the several sums of money therein mentioned to have been paid or allowed, have been really and bona fide paid or allowed by this deponent.

Sworn, &c. &c.

NUMBER 52.

REPORT ON PASSING ACCOUNTS.

In the matter of }
 A. B. a lunatic. }

To the Honorable, &c. &c.

IN pursuance of an order of this Honorable Court dated on the day of (If the order has been obtained on petition, as in England) or, in pursuance of the general rule of this Honorable Court, to that effect made, I the subscriber, one of the Masters of this court (residing, &c.) do report.—That I have been attended by the solicitor of the committee of the lunatic, (and also by the solicitor of G. S. and D. S. next of kin of the said lunatic,) and the said committee hath brought in before me, an account of his receipts and payments commencing on the day of and ending the day of and made an affidavit of the truth thereof, and exhibited satisfactory vouchers respecting the same;—I find that he hath received during such time several sums of money, amounting together to the sum of \$ (which be-

ing added to the sum of \$ the balance in his hands on passing his last accounts,) makes the sum of \$ wherewith I have charged the said committee.

And I also find that he hath during the time aforesaid expended and paid out the sum of \$ in and about the property of the lunatic, towards his maintenance, and in other proper outgoings, the amount of \$ which I have allowed the said committee—and there remains in his hands to balance his said accounts the sum of \$ The particulars of his receipts, payments, and allowances, appear in the schedule marked A. hereto annexed.(a)

All which, &c.

M. H. Master in Ch'y.

NUMBER 53.

AFFIDAVIT OF GUARDIAN ON PASSING ACCOUNTS.

(See affidavit of Committee Lunatic.)

REPORT ON GUARDIANS PASSING ACCOUNTS.

(See Report on Committees passing Do.)

(a) If the course of requiring the committee, &c. to pay in their balances should be adopted, the Master may proceed thus—And I appoint the above balance, (or,) the sum of \$ part of the above balance in the committee's hands, to be paid into the hands of the Register of this court, on or before the day of a copy of an order to that effect being served upon him days before such time.

NUMBER 54.

STATE OF FACTS ON A REFERENCE TO SETTLE ALI-MONY, AND COSTS OF SUIT.

S. D. }
 v. }
 T. D. }

State of Facts and Proposal of the Com-
 plainant under an order of reference of
 26 March, 1821.

THAT the property whereof the above named defendant was seized and possessed at the time of filing the bill in this cause viz. the 1st January, 1821, is as follows, to wit : A certain lot of ground, and four houses with other messuages, situate in Pearl street in the city of New York, of the value of \$16000, and yielding a yearly rent of about \$4300. Such premises are subject to two mortgages, one dated the 15 May, 1815 for securing the payment of \$4000, and the other dated the 15 May, 1818, for securing the payment of \$2000, in each of which mortgages, the complainant joined, and duly acknowledged her execution thereof ;—That the interest of such mortgages is six per cent per annum, making the whole interest payable to be \$420.,

That there are no judgments against the said defendant, docketed prior to the marriage between the parties, and no other incumbrances upon the said premises in which the complainant has joined, than these above mentioned. That there are no children, the issue of the complainant and the defendant, now living. The complainant proposes the sum of \$450, to be allowed her for her annual maintenance.—And craves leave to add to, or alter this her state of facts, as she may be advised.

AFFIDAVIT.

State of New York ss.

S. D. of the city of New York, being duly sworn, saith, that the matters set forth in the foregoing state of facts, are true, to the best of her knowledge and belief.

Sworn, &c. &c.

In Chancery.

S. D. }

v. }

T. D. }

REPORT.

To the honorable James Kent, Chancellor
of the State of New York.

IN pursuance of an order of this Honorable Court, made in the above cause, and dated the 26th day of March, 1821, I the subscriber, one of the Masters of this Court, residing in the city of New York, do report :—

That I have been attended by the solicitors for the above named complainant, and for the above named defendant, and having heard the allegations and proofs, as to the value of the estate of the defendant at the time of filing the bill, and the allowance proper to be made to the complainant for her support, do report, that the property of the said Timothy Dandy, the defendant, consisted at the time of filing the bill in this cause of a certain lot of ground in the city of New York fronting on Pearl street, and running through to Chesnut street; that there are four brick tenements upon such premises; the value of the whole being estimated at, from fourteen, to sixteen thousand dollars, and the yearly rent, and income of which is about the sum of thirteen hundred dollars.

And further, that it does not appear, that the said defendant was, at the filing of the bill, entitled to, or in possession of any other property. —That there are certain outstanding debts referred to in the annexed power of attorney, the amount of which, however, and the responsibility of the debtors does not appear.

And I find, that there are two several mortgages upon the said above mentioned premises, executed before the filing of this bill, by the said defendant, and also by the complainant, and duly acknowledged by her, according to the statute in such case provided ;—That one of such mortgages dated the 15th May, 1815, is for securing the sum of \$4000—and the other dated the 5th May, 1818, for securing the sum of \$2000—making a charge upon the premises at that time of \$6000, and the annual interest thereof \$360—the same being at six per cent. And further, that it appears that since the filing of the bill in this cause, the said defendant has executed another mortgage upon the premises for the sum of \$4500, bearing an interest of six per cent—that the said complainant did not become a party to, execute, or acknowledge the same; and therefore that in estimating an allowance to her, I have wholly disregarded such mortgage.

And I further report, that I have considered it as the general rule of the court, in allowing a sum for a separate maintenance, to make it by analogy to the right of dower of the wife, and to her interest under the statute of distributions, if her husband was dead intestate, subject however to alteration in the discretion of the court, according to the circumstances of the case; and that I find after paying the interest of the aforesaid mortgages, to wit, the sum of \$360, the income of the defendant's property (it being wholly real) is the sum of \$940, the one third of which is £313, 3s—but as it has appeared by the testimony taken by one, and hereto annexed, that such property was in a great measure procured by the assiduity and exertions of the complainant, and as there are no children of the marriage to be supported by the defendant, I have considered an increase to that allowance proper; and am of opinion that the sum of \$400 a year is a suitable allowance for the separate maintenance, and alimony of the said complainant, to be paid to her half yearly.

NUMBER 56.

ADVERTISEMENT FOR CREDITORS.

First Advertisement. Pursuant to a decree of the Court of Chancery for the State of New York, made in a cause, *J. and others v. L. and others*, the creditors and legatees of E. M. late of in the county of deceased, are forthwith to come in and prove their respective debts, and claim their respective legacies, before F. I. Esquire one of the Masters of said court, at his office, No. in the city of New York, or, in default thereof, they will be excluded the benefit of the said decree.

Second Advertisement. Pursuant to a decree of the Court of Chancery for the state of New York, made in a cause, *Johnson and others v. Latham and others*, the creditors and legatees of E. M. of in the County of deceased, are to come in, and prove their respective debts, and claim their respective legacies before F. I. a Master of said Court, at his office, No. in the city of New York, on, or before the day of next, or, in default thereof, they will be excluded the benefit of the said decree.

NUMBER 57.

FOR THE CHARGE OF A CREDITOR COMING IN.
(See No. 18.)

NUMBER 58.

REPORT ON A BOND AND MORTGAGE, INFANTS CONCERNED.

In Chancery.

The Insurance Company }

v.

J. J. and others.

REPORT.

To the Honorable James Kent, Chancellor of the State of New York.

IN pursuance of an order of this Honorable Court made in the above cause, and dated the 18th day of November, 1822, I the subscriber one of the Masters of this court, residing in the city of New York, do report :—

That there is due to the complainants, for principal and interest upon the bond and mortgage mentioned in their bill of complaint, at the date of this report, the sum of \$6792, 60 cents.

Schedule A. to this report annexed, exhibits the amount due for principal and interest respectively, the period of the computation of the interest, and its rate.

And I further report, that I have taken the testimony of A. B. and C. D., witnesses produced before me, as to the situation and value of the premises contained in the aforesaid mortgage ; And I find, that the same of a lot of ground in the city of New York of a width of about seventeen feet, and nine inches in front, and eighteen feet one inch in rear, and between seventy four and seventy five feet in depth on each side, and that there is upon the same a store or ware house, and that such premises are of the value of about six thousand dollars.

The sum reported due by me being \$6792 60-100, I therefore find it necessary, that the whole of the aforesaid premises should be sold to satisfy the same.

And I also find that the bond and mortgage in question were duly executed ; that I have examined under oath A. B. of the city of New York the subscribing witness to the bond mentioned in the bill of complaint who has deposed that he saw the said C. D. sign and execute such bond,

and signed his name as a subscribing witness thereto, that the mortgage aforesaid was duly acknowledged before B. N. Ledyard a Master in Chancery for the State of New York, on the 3d day of November 1810; and registered in the office of clerk of the city and county of New York, on the 6th day of November, 1810, as appears by certificates of such Master, and of the clerk of the said city and county for the time being, thereupon indorsed.

All which, &c.

NUMBER 59.

DECREE OF SALE.

In Chancery.

At a Court of Chancery held in the city of New York on the day of 1823.

Present,

The Honorable Nathan Sanford Chancellor of the State of New York.

D. H. }

v. }

I. S. }

THIS cause having been brought to a hearing this day on the report of M. H. one of the Masters of this court bearing date the day of to whom it was referred to compute and ascertain the amount due to the complainant for principal and interest on the bond and mortgage mentioned and set forth in the complainant's bill of complaint, and also the amount due to the defendant T. R. M. on the bond and mortgage mentioned in the said bill, and particularly set forth in his answer; by which said report it appears that there is due to the complainant for principal and interest upon his said bond and mortgage at the day of the date of the said report the sum of and to the defendant T. R. M. for principal and interest on his said bond and mortgage at the day of the date of the said report the sum of whereupon on reading and filing the said report, and on motion of M. C. counsel for the complainant it is ordered, adjudged and decreed, that the said report and all the matters and things therein contained do stand ratified and confirmed. And on the like motion it is further ordered, adjudged and decreed, and his honor the Chancellor by the power and authority of this court, doth accordingly order, adjudge, and decree, that all and singular the mortgaged premises mentioned and set forth in the complainant's bill of complaint in this cause, be sold at public auction on

the premises by or under the direction and superintendence of one of the Masters of this court, the said Master giving weeks previous notice of the time and place of such sale weekly in one of the public newspapers printed in the city of New York and in the public newspaper printed in the county where the said premises are situated, and also by affixing a copy of the advertisement on the outward door of the court house in the said county, weeks before the day of sale; which said mortgaged premises are described as follows.—(Boundaries.) And on the like motion, it is further ordered, adjudged and decreed, that the complainant may become the purchaser of the said mortgaged premises on such sale; that the said Master execute to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance for the same, whether such purchaser or purchasers be the complainant or any other person or persons; that the said Master in the first place pay to the complainant or his solicitor in this cause, out of the proceeds of such sale the said sum of so as aforesaid reported to be due to him with lawful interest thereon from the day of the date of the report, and his costs of this suit to be taxed, or so much thereof as the purchase money will pay of the same, on receiving a receipt for the amount so paid, to be signed by the said complainant or his said solicitor. And if the said mortgaged premises should sell for a sum exceeding the amount of the complainant's debt, interest, and costs as aforesaid, then that the said Master in the next place, pay to the defendant T. R. M. or his solicitor in this cause from and out of the said proceeds of such sale the said sum of so as aforesaid reported to be due to him with lawful interest thereon from the day of the date of said report and his costs in this cause to be taxed, or so much thereof as the purchase money will pay of the same, after first satisfying the complainant for his debt, interest, and costs as aforesaid.—And that the said Master take from the said T. R. M. or his said solicitor a receipt for the amount so paid to him, and file such receipts as aforesaid with the Assistant Register of this court at the time of filing his report of such sale; and that he bring the surplus moneys, if any there be, into court and deposit the same with the said Ass. Register, and make report to this court of his proceedings in the premises; and of all he shall do by virtue hereof, with all convenient speed.—(And on like motion it is further ordered, that the purchaser or purchasers of the said mortgaged premises at such sale, be let into the possession thereof.) This clause is inserted under the rule of the circuit court of equity.

At a court held, &c. &c.

This cause coming on this day to be heard on the report of M. H. esquire, one of the Masters of this court, bearing date the 9th day of June, 1820, by which said report, it appears, that the amount of the condition of the bond mentioned in the complainant's bill, being \$19000, was made payable thereby at distinct periods in separate instalments.

That the whole of such instalments have been paid except the sum of \$7000, the last instalment mentioned therein, and which will not be due or payable until the first day of July, 1822. And that there was due to the complainants upon the said bond and mortgage for interest at the date of said report, the sum of \$450, which became payable on the first day of July last. Whereupon on reading and filing the said report, and also on reading and filing an affidavit of the regularity of the proceedings to take the complainant's complaint pro confesso, against the defendants. And on motion of A. B. esquire, solicitor for the complainants, it is ordered, adjudged and decreed, that the said report be, and the same is hereby confirmed, and on the like motion, it is further ordered, adjudged and decreed, and his honor the Chancellor, by the power and authority of this court, doth accordingly order, adjudge, and decree, that the mortgaged premises mentioned in the complainant's bill of complaint in this cause, or so much thereof, as will be sufficient to pay the sum of \$490, reported due, and costs to be taxed, together with the further sum of \$490 interest, which will fall due on the first day of July next, before the sale to be made can be effected; and which can be sold separately without injury to the parties or either of them, be sold at public auction at Athens in the county of Greene, by or under the direction of one of the Masters of this court, the said Master giving six weeks notice of the time and place of the said sale by advertisement containing a brief description of said premises, to be inserted in a public newspaper printed in the county of Greene, if one be printed in that county, and if not, then in a public newspaper printed in the county nearest adjoining the said premises, and also by affixing a copy of the said advertisement in a conspicuous place on the outer door of the court house of the said county of Greene, which said mortgaged premises are described as follows. "Boundaries."

And it is further ordered that the said Master execute to the purchaser or purchasers of the said premises good and sufficient deed or deeds for the same; (a) and bring the monies and proceeds arising from the said sale into this court, and deposit the same with the register or as-

(a) As the Master now pays over the amount due the complainant, and other parties, and brings the surplus only into court, the above form will require some alterations. It might run as follows:—

"And it is further ordered, that the said Master execute and deliver to the purchaser or purchasers of such premises good and sufficient deed or deeds for the same, and out of the monies and proceeds arising from such sale, pay to the complainants or their solicitor, their costs of this suit to be taxed, and also the said sum of \$490 reported to be due to them with interest thereon, &c." Altering the form so as to direct the Master to pay instead of the Register or Assistant Register,—directing the Master to bring the residue into court, to abide its further order.

sistant register thereof, and make report to this court of his proceedings in the premises with all convenient speed.

And it is further ordered, adjudged, and decreed, that out of the said monies and proceeds the said register or assistant register pay to the said complainants, or to their solicitor, their costs of this suit to be taxed, and also the said sum of \$490 reported to be due to them with lawful interest thereon from the said 9th day of June, 1820, (the day of the date of said report,) and also the further sum of \$490 further interest to accrue on the first day of July next.

And it is further ordered, that if the whole of the said mortgaged premises be sold under this order, or if the proceeds of the sale of so much thereof, as may be sold by the Master, be greater than the amount reported due with Interest from the date of the report, together with the complainants' cost, and the aforesaid sum of \$490 interest hereafter to fall due as aforesaid, that in either such case the register or assistant register pay to the complainants or their solicitor out of such monies as may be deposited by the Master as the proceeds of such sale in addition to the amount reported due with interest thereupon and costs, and the sum of \$490 interest to accrue as aforesaid, so much thereof as will be sufficient to pay the principal sum, and demand mentioned in the condition of the said bond, and reported as not payable by the said Master, being the sum of \$7000, with interest thereupon from the said first day of July now next ensuing, to the time of such payment by the register or assistant register. And that the residue of such proceeds if any, remain in court to abide its further order.

And it is further ordered, that if the whole of the said mortgaged premises shall not be sold under the foregoing order, that the plaintiff shall be at liberty hereafter from time to time, as the said annual interest shall become due and payable, or when the said principal sum shall become due, to go before a Master upon the foot of this decree, and obtain a report of the amount due and payable, to the end that such report being made to the court, an order may be thereupon made for a further sale of the residue of such mortgaged premises, or parts thereof to satisfy what shall be reported due with costs attending such report and sale.

NUMBER 60.

In Chancery.

The F. Insurance Company
in the city of New York.

v.

J. T. J., and Eliza his wife.

To the Honorable James Kent, Chan-
cellor of the State of New York.

The Petition of the Fire Insurance Company in the city
of New York, the above complainants by O. E., their so-
licitor—Respectfully sheweth:—

THAT on the 26th day of August now last past, a decretal order was made and entered in this Honorable Court in the above entitled cause, whereby, after reciting that the said cause had come on to be heard upon the report of M. H., one of the Masters of this court, bearing date the seventh day of August, 1822, from which report it appeared, that on the day of the date thereof, there was due to the complainants for principal and interest upon the two several bonds and mortgages, mentioned in the bill of complaint the sum of \$6639, 21 cents; that the principal sum mentioned in the condition of one of the said bonds, being the sum of \$3500, would not be payable until the 22d October, 1822—it was there-upon ordered, adjudged, and decreed, that all and singular the mortgaged premises mentioned in the complainant's bill of complaint, or so much thereof as would be sufficient to raise the said sum of \$6639, 21 cents with lawful interest on the same from the said seventh day of August last past together with the costs, and which could be sold separately without injury to the parties or either of them, should be sold at public Auction, by and under the direction of one of the Masters of the court, the said Master first giving public notice of the time and place of such sale in the manner directed by such decree.

That the mortgaged premises mentioned in the said bill of complaint, and described in such decretal order, consisted of three several lots or parcels of ground, situate in the city of New York.

And your petitioners further shew, that in pursuance of such decree, M. H. Esquire, one of the Masters of this court, caused to be sold at public auction in the city of New York, two of the aforesaid parcels or lots of ground, one situate in Fulton Street, and the other in Washington Street; that the purchase money of the former lot was the sum of \$6500 and of the latter lot, \$3700, as will fully appear by his report accompanying this petition, making the total amount of such purchase money the sum of \$10200. That since the date of the said Master's report the principal sum of \$3500, mentioned in his report of the seventh of August last as not then payable, has become due.

That in and by the above mentioned decretal order, it was further ordered, that if the whole of such mortgaged premises should not be sold

under the same, that the complainants should be at liberty thereafter, when the said principal sum not then due should become due and payable, to go before a Master upon the foot of the said decree, and obtain a report of the sum then due, to the end, that, such report being made to the court, an order might thereupon be made for the further sale of the residue of the said mortgaged premises, or a sufficient part thereof to satisfy what should be reported due with the costs attending such report and sale.

That in pursuance of such provisions, a report which accompanied this petition, has been obtained from M. H. esquire, one of the Masters of this court, whereby he finds due to the complainants for principal and interest upon the bond, mentioned in his former report, as not then payable, the sum of \$3597,32 cents.

That the sum reported due to said complainants by the said Master's former report with interest thereupon down to the date hereof will be about the sum of \$6825,10 cents, which added to the above sum now reported due, by the Master, will make the aggregate sum of about \$10422,42 cents coming to the complainants, independent of their costs to be taxed; that the purchase money of the two parcels sold by the Master as aforesaid, to wit, the sum of \$10200, will therefore be insufficient to satisfy the said complainants the amount justly due to them.

Your petitioners therefore pray, that pursuant to the before recited provision of the said decretal order, an order may be entered for the sale of the remaining lot or parcel of ground mentioned and described in such decree, and now unsold, or such part thereof as will be sufficient to raise the balance coming to the said complainants, with interest and costs, and which can be sold separately without injury to the parties, or either of them, under such direction as to the time of advertising and otherwise, as to your honor shall seem meet.

And your petitioners, &c. &c.

O. E. Esq. Sol,

Dated this 31st Dec. 1822.

NUMBER 61.

At a court of Chancery held for the State of New York, at the Chancellor's dwelling house, in the city of Albany, on the 13th day of January, 1823.

Present, The Honorable James Kent, Chancellor.

The Fire Insurance Company
in the City of New York,

v.

J. T. J. and Eliza, his Wife.

UPON reading and filing a report made in this cause by M. H. Esquire, one of the Masters of this court, bearing date the 31st December last past, by which it appears, that two of the lots or parcels of the premises mentioned and described in the complainant's bill of complaint, and the decretal order of this court, made in this cause, bearing date 26th August last past, were sold at public auction in the city of New York for the sum of \$10200.

And upon reading and filing a further report made in this cause by the said Master, bearing date the 31st December last past, to whom it was referred, on the foot of said decretal order, to ascertain and compute the amount due to the Complainant for the principal and interest, on one of the bonds and indentures of mortgage mentioned in the said bill, bearing date the 26th October 1821, and by the said Master, in a report by him made in this cause, of the 7th August, 1822, reported not then due and payable, by which said report, it appears, that on the said 31st December there was due to the said complainants for principal and interest, upon said bond and mortgage, the sum of \$3597,32 cents.

And upon reading and filing a petition of the said complainants by O. E. their solicitor, praying that an order may be entered for the sale of the remaining lot or parcel of ground, mentioned and described in said bill, and in said decretal order, and now unsold. And on motion of O. E. solicitor for the complainants, it is ordered, adjudged and decreed, that the said above mentioned reports, and all the matters and things therein contained, do stand ratified and confirmed.

That the said lot or parcel of ground, mentioned and described in said bill of complaint, and not sold under said decretal order with the appurtenances be sold at public auction to the highest bidder, by and under the direction of one of the Masters of this court, the said Master giving two weeks notice of the time and place of such sale by advertisement, containing a brief description of said premises, to be inserted in two of the public newspapers, printed in the city of New York, one of which papers to be a morning, and the other an evening paper, and that the said advertisement be inserted daily (Sunday excepted) during the said

two weeks, which said lot or premises are described as follows, viz. (Boundaries.)—(And then directs as to the payment of the proceeds by the Master.)

NUMBER 62.

REPORT OF SALE.

In Chancery.

H. G.

v.

H. D. and his wife. }

Report.

To the Honorable James Kent, Chancellor of the state of New York.

IN pursuance of a decretal order of this honorable court made in the above cause, and dated the 9th day of February in the year 1822, I the subscriber one of the Masters of this court, do report :—

That all and singular the mortgaged premises, mentioned in the complainant's bill, and in the decree in this cause, were sold under my direction, and in my presence, at the Tontine Coffee house in the city of New-York, on the third day of April in the year 1822. That previous to such sale I gave three weeks public notice of the time and place thereof by advertisement, containing a brief description of such premises, published in two of the newspapers printed in the city of New York, the one a morning and the other an evening paper, and published for the period, and in the manner directed by such decree.

That at such sale, the said premises were struck off to the above named complainant, for the sum of \$2500, that being the highest sum bid- den therefor ; that such amount is less than the amount reported due to the said complainant, viz. the sum of \$5142, 19 cents, as will appear by my report dated the seventh day of February in the year 1822) and that I have therefore, according to the provision of the said decree to that effect, taken from the solicitor of the complainant, a receipt for the said purchase money, to wit the sum of \$2500, which I have filed with the assistant register of this court.

And further, that I have delivered to the said complainant, a good and sufficient deed of the premises so sold by me, and which premises as described in the said bill of complaint, decretal order, and in the said deed executed by me, are as follows, to wit :—(insert boundaries.)

All which is respectfully submitted.

Form where a Stranger is purchaser.

That at such sale the said premises were struck off to A. B. of, &c. for the sum of \$ that being the highest amount bid for the same, that I have executed and delivered to the said A. B. the purchaser aforesaid a good and sufficient deed of the premises and have received from him the said sum of \$ and that I have paid the same to S. B. Esq. Solicitor of such complainants, pursuant to the directions of the decree in this cause, the same being less than the amount reported due to such complainants, viz. the sum of \$ as will appear by my former report in this cause of the day of last, and I have taken a receipt from the said solicitor for such purchase money which is annexed to this report.

(Or) And that I have received the said sum of \$ the purchase money aforesaid, and out of the same have paid to S. B. the solicitor of the compl. the sum of \$ for the costs of such compl. as taxed, and also the sum of \$ being the amount reported due to such compl. with interest from the day of the date of such report, and have brought the sum of \$ the surplus of such purchase money into this Court, and deposited the same with the Ass. Register.

NUMBER 63.

MASTER'S DEED.

THIS indenture made the day of in the year of our Lord 1823:—Between M. H. one of the Masters in Chancery, for the State of New York, dwelling in of the first part, and A. B. &c. of the second part; Whereas, at a Court of Chancery, held for the State of New York, at on the day of 1823, it was among other things ordered, adjudged, and decreed, by the said Court, in a certain cause then depending in the said Court, between A. B. &c. complainants, and C. D. &c. defendants, that the mortgaged premises mentioned and set forth in the hereinafter particularly described, be sold by or under the direction and superintendence of one of the Masters of this Court at public auction the said Master first giving weeks notice of the time and place of such sale, in of the public newspapers printed

And whereas the said M. H., Master in Chancery as aforesaid, and party of the first part to these presents, in pursuance of the said or-

der and decree of the said Court of Chancery, did on the day of the date of these presents, sell at public auction the said mortgaged premises, hereinafter particularly described, having first given weeks previous notice of the time and place of sale, with a brief description of the said premises, agreeable to the order aforesaid; at which sale the said mortgaged premises hereinafter particularly described struck off to the said part

of the second part to these presents, for the sum of dollars, that being the highest sum bidden for the same. Now therefore this indenture witnesseth, that the said M. H., Master in Chancery, as aforesaid, and party of the first part to these presents, in order to carry into effect the said sale, so made as aforesaid, in pursuance of the said decree of the said Court of Chancery; and also by virtue of the act of the legislature of the State of New York, in such case made and provided, and in consideration of the premises, and of the said sum of dollars, paid at the time of the execution hereof by the said part of the second part to these presents to the said M. H., Master in Chancery, as aforesaid, the receipt whereof he doth hereby acknowledge, Hath granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents Doth grant, bargain, and sell, alien, release, convey and confirm unto the said part of the second part, and to heirs and assigns forever—(All, &c. Boundaries.) Together with all and singular the rights, members, privileges, hereditaments, and appurtenances to the same belonging, or in any wise appertaining. To have and to hold all and singular the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, unto the said part of the second part heirs and assigns, to the only proper use, benefit and behoof of the said part of the second part heirs and assigns forever.

In witness whereof, the said M. H. Master in Chancery, as aforesaid, hath hereunto set his hand and seal the day and year first above written.

Scaled and delivered }
in the presence of }

NUMBER 54.

ORDER TO DELIVER POSSESSION.

(In *Renshaw v. Thompson*.—The decree not directing it.)

"IT is ordered that the said E. T. one of the defendants in this cause, on being served with a certified copy of this order, forthwith deliver up to the said J. B. the mortgaged premises mentioned and described in the pleadings and decree in this cause, and in the deed executed by the Master to the said J. B., in pursuance of the said decree; and upon such service, accompanied with a demand of the said possession, and a refusal thereof, the said J. B. may apply for an injunction according to the course of the court in such cases."

NUMBER 65.

WRIT OF EXECUTION OF A DECREE FOR POSSESSION.

THE people of the State of New York, &c.—To C. D. [*and to all and every other person or persons whom the the tenor of these presents doth concern :—] Whereas by a final decree and judgment made in our Court of Chancery, between A. B. complainant, and C. D. defendant, and bearing date the day of last past; it was among other things, ordered, adjudged, and decreed,—“That the said C. D. the defendant being in possession of the lands and premises in question in this cause, or any person who has come in under him *pendente lite*, should deliver possession of the same, and of all deeds and writings in your custody or power relating thereto, to the complainants in this cause.

Now we command you the said C. D. and all and every the persons above mentioned, that immediately after the receipt of this writ, you do deliver possession of the premises in question in this cause to the said A. B. according to the tenor and effect of the said decree; and hereof you are not to fail at your peril.

Witness, &c.

* The words enclosed in brackets are to be omitted where the order is to be performed by defendant alone.

NUMBER 66.

AFFIDAVIT SERVICE, AND REFUSAL.

Title.

STATE of New York, ss. W. M. of, &c. maketh oath and saith, that upon the day of last, he this deponent did personally serve the defendant C. D. with a writ of execution of a decree made in this cause, bearing *teste* the day of last past, by shewing the said writ under seal of the said court unto the said defendant, at his house in, &c. at the same time delivering unto him a true copy thereof; by which decree and writ the defendant was commanded to deliver possession of the premises in question in this cause, and of all deeds and writings in his custody, or power relating thereto, to the complainant A. B. (and at the same time the plaintiff in this cause, then being present did require the said defendant to deliver possession of the said premises, and such deeds and writings to him, *which he refused to do,*^(a) nor hath he since done the same to this deponent's knowledge or belief.

(a) The affidavit may state the conduct of the party specially, if he did not absolutely refuse, or the witness hesitates to pronounce it a refusal. But it certainly would be sufficient to procure the injunction, that he should swear, that the party being required, did not deliver up possession, nor has done it since, to his knowledge or belief.

In the precedent in 2 Newland, of an affidavit of service of a writ of execution of a decree for payment of money, after stating the service of the writ, is added—"at the same time this deponent shewed unto the defendant a letter of attorney, executed by the complainant, under his hand and seal, empowering this deponent to ask and receive of the said defendant the said sum of a copy of which letter of attorney this deponent then also left with the said defendant, of whom he did then demand the said sum of but the defendant did not then pay the same, or any part thereof to this deponent, nor hath he yet paid the same to this deponent, or to the plaintiff, or to any other person for his use to this deponent's knowledge or belief."

It might often be convenient to give a similar letter of attorney to a person to demand and receive possession of lands on behalf of the complainant in a suit.

NUMBER 67.

ORDER FOR INJUNCTION.

UPON reading and filing an affidavit of A. B. whereby it appears, that the *defendant* C. D. (who is in possession of the lands in question in this cause) was served with a writ of execution of the decree to deliver possession in this cause, or, (*with a copy of the order to deliver possession in this cause,*) and that the plaintiff required him to deliver possession which he refused, and upon reading the said decree, (or order) and upon motion of, &c. it is thereupon ordered, that a writ of injunction be awarded against the defendant C. D. to deliver possession of the said lands.

NUMBER 68.

INJUNCTION.

THE people of the state of New York, &c. To C. D. &c. Greeting :—Whereas it has been represented to us in our court of chancery in a cause wherein A. B. is complainant, and you the said C. D. is defendant, *that by the decree in this cause,* or, (an order made in this cause dated, &c.) it was ordered, (follow decree) that you should deliver possession of the premises in question, and all deeds and writings in your custody or power relating thereto, to the complainant ; that you the said defendant, who are in possession of the premises in question, were served *with a writ of execution of such decree* (or, *a copy of such order*) and have been required to deliver possession of the said premises, which you refuse to do ; and that thereupon it was ordered, that an injunction be awarded against you the defendant to enjoin you to deliver possession of the said messuage and lands, to the said complainant, pursuant to such decree. We therefore in pursuance of the premises, do strictly enjoin and command you the said defendant C. D. under the penalty of one thousand pounds to be levied upon your lands, goods and chattels, to our use, that you do deliver the possession of the said lands and premises, and of every part and parcel thereof, to the said complainant A. B. pursuant to the said decree : And hereof fail not at your peril.

Witness, James Kent, &c.

APPENDIX.

NUMBER 69.

AFFIDAVIT OF SERVICE.

(See No. 66, Affidavit of service of the writ of execution.)

NUMBER 70.

ORDER FOR WRIT OF ASSISTANCE.

(See No. 67, Order for injunction.)

NUMBER 71.

WRIT OF ASSISTANCE.

THE people of the state of New York—To the sheriff of the city and county of New York,—Greeting. Whereas C. D. of, &c. by our writ of injunction issuing out of our court of Chancery, in pursuance of a certain order made in our said court, in a cause between A. B. complainant, and the said C. D. defendant, dated the day of was commanded and enjoined, that he should deliver up the possession of the lands and tenements in question in this cause to A. B. the said complainant, (a) according to a certain decree or order in our said court lately made and rendered, dated the day of Now since it has been shewn to us in our said court, that the said C. D. has refused to obey the command in our said writ of injunction contained; Know you that in pursuance of an order made in our court of Chancery between the parties aforesaid on the day of We have given and by

(a) The form in the register states the boundaries of the lands as contained in the injunction; but in the later precedents of the injunction, the lands are referred to only as the lands in *question in this cause*, and I have therefore altered the above form in that particular.

The form must be varied in a case, where the person in possession has come in *pendente lite*.

these presents do give you full power and authority immediately after the reception of this writ, and do hereby command you to go and enter into and upon the premises in our aforesaid decree mentioned and expressed, and known and described as follows, to wit :—All, &c. &c. and that you eject and amove therefrom all and every person or persons holding possession of the same against the tenor of the said decree, and our writ of injunction aforesaid. And that you put and establish the above named complainant, or his assigns in full and peaceable possession of the said premises ; and that you from time to time, as often as shall be necessary, preserve and defend the said complainant, his heirs and assigns in such possession of the aforesaid premises, against all force and interruption whatsoever according to the true intent and meaning of our decree and writ of injunction aforesaid. Witness, &c. &c.

NUMBER 72.**JURAT TO AN ANSWER.**

“THE defendant was on the day of sworn before me, that what was contained in this his answer, as far as concerned his own act and deed was true of his own knowledge, and that what related to the act and deed of any other person or persons he belieyed to be true.”

NUMBER 73.**GUARDIAN OF AN INFANT.**

A. B. Guardian ad litem of the infant defendant C. D. was this day of sworn before me, that the matters of fact contained in this answer so far as, &c. &c.

NUMBER 74.

JURAT OF THE ANSWER OF A CORPORATION.

THE answer of the defendants the president, directors, and company of the bank of America was taken this day of in the year 1821, before me, under the common seal of the said corporation, as by their said seal affixed appears. 2 Fowler, 416. 422.

M. H. Master in Ch'y.

NUMBER 75.

JURAT OF ANSWER OF A FOREIGNER.

THE defendant A. B. being a foreigner, and unacquainted with the English language, was on this day of at the city of New York, sworn before me by the interpretation of A. H. P. (who was sworn truly to interpret) that the matters, &c. &c. 2 Fowler, 429.

Note. The interpreter should be sworn faithfully and truly to interpret the questions to be asked by the Master, and the oath to be administered to the party.

The affidavit of an interpreter of having translated the bill and English answer should be annexed to the answer. The following is the form in 1 Fowler Exch. Pr. 429.

Between A. B. Plaintiff
and
C. D. Defend't. }

E. F. of in the county of Gentleman, maketh oath and saith, that he hath truly and correctly read over and translated to the defendant the bill filed by the plaintiff in this cause : And this deponent further saith, that he hath read over to the defendant the translation in the French language of the English answer of the said defendant hereunto annexed : And this deponent farther saith, that the same is a just and true translation of the English into the French language, which said answer is also hereunto annexed.

E. F.

Sworn, &c. &c. before me,

M. H. Master in Ch'y.

NUMBER 76.

EXCEPTIONS TO AN ANSWER FOR INSUFFICIENCY.

Between A. B. Plaintiff
and
C. D. & others D'ts. }

Exceptions taken by the complainant to the insufficient answer of the defendant C. D.

First exception.

For that the said defendant hath not, in and by his said answer, to the best of his knowledge, remembrance, information, and belief, set forth and discovered, whether he did not represent to his creditors, or some or one of them, that his last proposition to his creditors mentioned in the Bill, to wit, that of paying 6s. 8d. in the pound was "*to the extent of his property and some risk on dubious debts,*" or words of like import.

Second exception.

For that the said defendant has not (as required by the bill) set forth the particular *losses and disappointments* (if any) which occasioned his failure as pretended in his circular letter set forth in the bill nor whether he was not apprized thereof at the time when the said purchases, or some of them were made by him.

Third exception.

For that the said defendant has not answered, whether he did not state to the complainant A. B. or to others of his creditors that his confidential debts required immediate payment, and that he must make large sacrifices for that purpose, nor has the defendant set forth as required by the bill *when and how* the said sacrifices (if any) were made or the said confidential debts paid.

In all which particulars the said complainant is advised, that the said answer of the said defendant is evasive and insufficient, and ought to be amended, and humbly prays the same may be amended accordingly.

NUMBER 77.

In Chancery. REPORT UPON EXCEPTIONS.

W. I. and others }
 v.
 G. H. }

REPORT.

To the Honorable James Kent, Chancellor
 of the State of New York.

IN pursuance of an order of this Honorable Court, made in the above cause, and dated the 28th March, 1823, I the subscriber one of the Masters of this Court, residing in the city of New York, do report :—

That I have been attended by the solicitor of the complainants, and by the agent of the solicitor for the defendant, and having looked into the bill of complaint, the answer thereto, and the exceptions taken to be such, and I find :—

That the first, third, fourth, fifth, sixth, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-sixth, and twenty-seventh of such exceptions are well taken and the answer is insufficient in the matters thereof respectively :—

And that the second, eighth, tenth, and twenty-fifth of such exceptions are not well taken, and that the answer is sufficient in the matters thereof respectively.

All which is respectively submitted.

NUMBER 78.

REPORT OF IMPERTINENCE OF A BILL.

In Chancery.
 A. B., Exr. }
 v.
 C. D., &c. }

REPORT.

To the Honorable James Kent, Chancellor of
 the state of New York.

IN pursuance of an order of this Honorable Court made in the above cause, and dated the fifth day of June, 1822, I the subscriber, one of the Masters of this Court, residing in the city of New York, having been attended by the counsel of the complainant and defendant herein, and

having looked into the bill of complaint, and considered the statements and charges therein alleged to be impertinent, do certify :—

That the whole of the said bill from the letter A. marked by me on the first page of the copy produced before me, to the letter B. on the nineteenth page thereof is impertinent, except such part of the same on the third and fourth page thereof, as states the purchase and registry of the ship *Orris* in the names of the testator, and of John and George—from the figure 1. to the figure 2. marked by me—and such part thereof on the fifteenth page as relates to the proof of the will of B. M. and the granting of letters testamentary thereupon to the complainant, and which part is included between the figures 3 and 4. the substance of which several passages is pertinent to the matters in question, but will require to be amended if the passages, herein reported as impertinent, are expunged.

And further that a statement of the appointment of the defendants as consignees of the return cargo of the said vessel by the said John and George would be a pertinent statement, but that such statement, as contained in the bill is so mixed with impertinent matter, as not to be capable of separation, and therefore I have reported the same impertinent.

All which, &c.

New York, June 19th, 1822.

M. H. Master in Chy.

NUMBER 79.

REPORT OF IMPERTINENCE OF INTERROGATORIES.

In Chancery.

H. T. }

v. }

J. P. Jr. }

To the Honorable James Kent, Chancellor
of the state of New York.

IN pursuance of an order of this honorable Court made in the above cause, and dated the 20th day of January 1823, I the subscriber, one of the Masters named in such order, do report :—

That the solicitors as well of the complainant as of the defendant appeared before me. and the solicitor of the complainant specified the following cross interrogatories exhibited by the defendant as impertinent, scandalous, tending to criminate or disgrace the witnesses, or otherwise improper, in whole or in part, viz. 8th. 10. 13. 14. 15. 16. 17. 18. 19. 20. 28. 29. 30. 31. 32. 33. 35. 40. 45. 46. 48. 49. 50. 51. 52.

53. 54. 55. 56. 57. 58. 61. 65. 66. 70. 71. 72. 73. 74. 75. and 76. That the solicitor of the defendant consented before me, that the 17th, 20th, so much of the 54th as goes to enquire whether the witness did not boast of being well acquainted with the duties of under sheriff, and the residue of the said 54, the 56, the 65. 66. and the 73d. of such cross interrogatories should be stricken out, and the 61. was altered by consent.

And as to the residue of such cross interrogatories having perused the pleadings, and the direct interrogatories exhibited by the complainant, I report—that I find the 8. 10. so much of the 13. as inquires whether the witness had not said the defendant was a father to his family, and whether the defendant had not loaned to other branches of his family large sums of money and had made large presents to the witness and his family, and whether he had not boasted of the same, the 15. and so much of the 18. as enquires *whether the defendant did not advance money to the witness for the same*, meaning for a prosecution of one M. B., the 19. the 28. 29. the 30. except so much as enquires as to the witnesses knowledge of the defendant's property; the 31. 32. 33. 35. the 46. 49. 52. 60. much of the 55. as enquires as to the declarations of M. M. respecting his being the attorney of J. T. at the suit of J. P. Jr. so much of the 58. as enquires whether M. M. had not informed the witness that he was substituted as attorney for J. T. at the suit of the said J. P. Jr.; and that part of the 74. of such cross interrogatories as enquires, *"whether or no the witness did not say that the family of the said J. T. brought upon themselves ruin and disgrace,"* and to the end of such cross interrogatory, are merely impertinent and irrelevant to the issue, and some of them also scandalous.

That the 70. 71. 72. and 75. of such cross interrogatories are also impertinent upon the ground, so far as they relate to John Tredwell named therein, that they go to examine to the credit of a witness to be produced by the complainant, which I conceive can only be done after publication; and so far as they relate to the family of the said J. T., because they are scandalous and irrelevant to the matters in issue.

And I further report that the part of the 13. not above certified impertinent, the 14. 16. the part of the 18. not above certified impertinent the 48. the 57. and the 76. of such cross interrogatories are in my opinion pertinent to the matters in issue.

And that the 40 the 45. the 50. the 51. 53. 55. except such part as is above certified impertinent, the 54. except such part as is above stated to have been stricken out by consent, and the 58. except such part as is above certified impertinent, are in my opinion also pertinent and proper, inasmuch as I take the rule of the court to be, that upon a cross examination all questions may be put to a witness tending to disclose facts impairing the credibility of his testimony, whether the questions are such as the witness is protected from answering on the ground of their ten-

dency to criminate or render him infamous, or such as he may be compelled to reply to.

All which, &c. &c.

NUMBER 80.

ENROLMENT OF A DECREE OF SALE.

At a Court of Chancery held for the State of New York at the Capitol in the city of Albany on the twenty-seventh day of March in the year 1822.

Present, &c.

Title.

WHEREAS heretofore, to wit—at a Court of Chancery held for the State of New York, &c. at the city, &c. on the, &c. Before, &c. an order was made in the above cause, as follows, to wit:—A. B. v. C. D. It appearing by affidavit to the satisfaction of this court—(copy the order to appear and answer verbatim.) And whereas also afterwards, to wit—at a Court of Chancery held for, &c. at, &c. on, &c. Before, &c.—an order was made in the above cause as follows, to wit:—A. B. v. C. D. on reading and filing, &c. (copy order to take bill pro confesso verbatim)—And whereas also afterwards to wit, at, &c.—(as above copying the order of reference verbatim.) And whereas also on the day of the report in this cause of M. H. one of the Masters of this Court was filed which is in the words and figures following, to wit—(whole of Master's report verbatim.) Whereupon at a court of Chancery held for the State of New York at, &c. on the(a) said day of Before, &c. an order or decree was made and entered in the above cause as follows, to wit—A. B. v. C. D. (Copy decree, sale, &c. verbatim.)

And whereas also afterwards to wit at a court of Ch'y. held, &c. on the, &c. (date of filing report) the report of M. H. one, &c. was filed in this court, which report is in the words and figures following to wit:—In Chancery, (copy report) Whereupon on the said day of at, &c. an order was made in the above cause in the words following, to wit:—(copy usual order of confirmation nisi.)

(a) This form, if the decree is entered the same day the report is filed.—If not, the form is,—And whereas also afterwards, &c.

NUMBER 81.

In Chancery.

M. D.

v.

A. P. and others. }

Feb. 11th, 1822.

ON reading and filing the report of Partrick G. Hildreth, Esq. one of the Masters of this court, together with the petition of the Complainant and other papers annexed thereto. It appears by the said report, that in pursuance of an order of this honourable court made in the above cause on the 12 day of Nov. 1821. By which among other things it was ordered, adjudged, and decreed that the mortgaged premises described in the Compl't's bill of complaint, be sold at public auction to the highest bidder, by and under the direction of one of the Masters of this court, the said Master first giving three weeks previous notice of the time and place of such sale in two of the public newspapers printed in the city of New York. And it further appears by the said report, that on the 10th Jan. now last past, the said Master caused the mortgaged premises mentioned in the pleadings in the said cause to be exposed to public sale at the Tontine Coffee house in the city of New York, having first given three weeks previous notice of the said sale, in two or more of the public news papers printed in the city of New York, conformable to the directions contained in the order, at which sale the said premises were struck off to J. L. for the sum of \$5850, that being the highest sum bidden for the same, and that the next bid, immediately preceding the said Lewis's, being a bona fide bid of \$5800. And by the said report it further appears that immediately after the said premises were struck off to the said Lewis, he was requested to comply with the terms of the said sale by paying 15 per cent. of the said bid down, and executing a memorandum in writing obliging himself to pay the residue of the money on the delivery of the deed, to which request, the said Lewis replied, that he would go to his store and get the money immediately, and pay the same according to the conditions of the said sale. And by the said report it further appears, that after waiting the appointed time for the said L. and on hearing from him, that he could not comply with the terms of the said sale, and the bidders having left the coffee house, the said Master adjourned the sale until the 21st January then Inst. when he again exposed the said premises to sale, at which last sale the same were struck off to L. O. for \$5650, he being the highest bidder on that occasion, which said L. O. has complied with the terms of the said sale, leaving a deficiency between the bid of the said Lewis, and the sale made to the said L. O. of \$200, and that by the said report it further appears, that the proceeds of the sale will be insufficient to pay the amount due to the complainant,

together with the costs of suit. And that the said Master had given notice to the said J. S. L. of the said deficiency, and requested him to make good the same, which he had neglected to do, and it appearing by the petition of the compl't. annexed to the said report, that the said compl't. prays among other things, that an order be made requiring the said J. S. L. to pay the deficiency between the two sales, together with costs and charges of advertising and postponing the said sale, and her costs and charges of this application, and for such further and other order therein as his Honor the Chancellor should deem just. And it appearing by the papers annexed to the said report, that due notice of the application to his Honor the Chancellor, together with a copy of the said report and petition of the compl't. had been duly served on the said J. S. L. and no sufficient cause to the contrary appearing. On motion of Mr. H. B. on behalf of A. L. McD. Solicitor for complainant ; It is ordered, adjudged, and decreed; and his Honor the Chancellor doth hereby order, adjudge, and decree that the sale of the said premises to the said L. O. be confirmed. And it is further ordered, that the said J. S. L. pay to the assistant register of this court \$200, being the difference between the first and second sale, and the costs of the second sale, and of this application in ten days after the service of a copy of this order, or shew cause why an attachment should not issue against him.

NUMBER 82.

At a court of Chancery held for the state of
New York, at the city of Albany, on the 25th
day of March, 1822.

Present the Honorable James Kent, Esq. Chancellor.

M. G.

v.

A. P. and others. }

ON reading and filing an affidavit of the due service of a copy of an order made in this cause on the eleventh day of February now last past, by which the said J. S. L. was required to pay the assistant register of this court the sum of \$200, and the costs of the second sale of the premises in the pleadings in this cause mentioned, and the costs of the said application in ten days after a service of a copy of the said order, or shew cause why an attachment should not issue against him. A copy of the said order together with the certificate of the said assistant register, that the said money had not been paid to him, in pursuance of the said order being also annexed ; and no sufficient cause to the contrary appearing. On

motion of Mr. McDonald Solicitor for the complainant, it is ordered that an attachment issue against the said J. S. L., and that he stand committed until he shall comply with the said order.

NUMBER 83.

In Chancery.

M. D.

v.

A. P. and others.

Affidavit.

CITY and county of New York, ss. A. L. McD. solicitor for the complainant in the above cause being duly sworn deposeeth and saith that an order was made in this cause by his Honor the Chancellor bearing date the 11th February now last past, by which among other things, it was ordered, that the said J. S. L. (one of the defendants) pay to the assistant register of this court \$200, (being the difference between the first and second sale of the mortgaged premises) and the costs of the second sale, and the costs of the application in ten days after the service of a copy of the said order, or shew cause why an attachment should not issue against him. And this deponent further saith that the said order was duly served on the said J. S. L. And this deponent further saith, that it appearing by affidavit as by the certificate of the said assistant register that the said J. S. L. had not paid to the said assistant register the said \$200, and the costs of the said second sale of the said mortgaged premises, and the costs of the said application pursuant to the said order, and no sufficient cause to the contrary appearing; his Honour the Chancellor made another order in the said cause bearing date 25th March now last past by which it was ordered, that an attachment issue against the said J. S. L. and that he stand committed until he comply with the said order. And this deponent further saith that on or about 27th day of March now last past, an attachment was duly issued by E. Elm. Esq. one of the clerks of this court in pursuance of the said order, directed to the sheriff of the city and county of New York, commanding him to attach the said J. S. L. so as to have him in the Court of Chancery on the 11th day of April then next, wheresoever the said court should then be, there to answer as well touching the contempt, which he as is alleged had committed, as also such other matters as should then and there be laid to his charge; and further to perform and abide such order as the said Court should make in that behalf, and thereof to fail not, and to bring with him the said writ. And this deponent further saith that there was a label memorandum endorsed on the said attachment setting forth in

substance, that the attachment was issued against the said L. for his contempt in not paying to the Assistant Register of this Court the sum of \$200, the difference between the first and second sale of the said mortgaged premises and the costs of the said second sale, and the costs of the said application. And this deponent further saith that a memorandum was also left at the said sheriff's office stating the amount of the costs of the said second sale, and the costs of the said application. And this deponent further saith that the said sheriff of the said city and county of New York, has caused the said J. S. L. to be arrested on the said attachment on the first April inst. and took from the said J. S. L. together with certain other persons as securities, a bond payable to the said sheriff for liberties of the gaol of the said city and county of New York in the usual form of such bonds, and permitted the said J. S. Lewis to go from and without the actual custody of the said sheriff; And this deponent further saith not.

Sworn the day of April, }
1882, before me,

ADDENDA.

✓
Note to page 130.

THE author has had the advantage of perusing a copy of the Chancellor's opinion in *McWhorter v. Benson*, and the importance of the decision, as well as the satisfactory and elaborate reasoning of the Chancellor, induces him to make copious extracts from it.

The executor had employed an agent in the management of the estate, and had allowed him five per cent. commissions for his services. The Chancellor recognizes the rule, that an agent may be employed in cases where the circumstances of the estate render it expedient, and that the estate must bear the charge of a reasonable allowance to him,—and he considered that the allowance there made was proper and just.

He then proceeds,—“The Master has allowed to the defendant B. the sum of dollars; and this allowance is stated to be—‘the sum charged by B. as a compensation for his services rendered to this estate, which charge is made by him in lieu of all commissions under the act of the legislature, and the rule of this Court made in pursuance of that act.’ This allowance is now claimed by the executor, and is opposed by the complainants.

Before the act of the 15th of April, 1817, an executor was not entitled to any compensation for his services in the discharge of his trust. By that statute it is enacted,” &c. &c. (reciting the provisions of the act, and of the rule of court.)

“No other regulation upon this subject has been made by this court.

It is only under this statute that an executor can claim any reward for his services, and the true meaning of this new law must be ascertained.

The statute consists of two principal clauses.

The first authorizes this court to make a reasonable allowance to guardians, executors, and administrators, for their services. These terms are clear, and they regulate the compensation in no other manner, than to require, that it shall be reasonable.

If this principle alone had been the object of the law the provision was complete in the first clause; nothing more was necessary, and nothing

more would have been enacted. Every executor might then have claimed compensation for all his services, and the allowance must have been reasonable, according to the circumstances of each case. But the last clause of the statute provides, that when the rate of such allowance shall have been settled by the chancellor, it shall be conformed to in all cases. These terms are fully extensive with the preceding provisions; "such allowance" plainly comprehends the reasonable allowance, and every allowance mentioned in the first clause. The term "rate" is certain in its sense. The term "settled" conveys precisely and strongly the idea of a rule; and the words "the rate of such allowance when settled," when taken together, show clearly that a fixed rule was the object of the law. The application and extent intended to be given to such a rule are clearly shown by the concluding words of the clause, which declare, that the rate of such allowance when settled, "shall be conformed to in all cases." And the cases here intended are evidently all the cases, in which by the preceding provision any allowance is to be made. According to the sense of all these terms, the second clause of the statute embraces all the cases mentioned in the preceding provision. The statute therefore gives power to this court to make allowances by settling rates; a power to establish rates, and to allow according to such rates; and it does not authorise the court to make special allowances, without regard to rule or rate. This construction is denied; it is said, that the statute not only authorizes the court to establish rates of allowance, but also to make allowances without a rate; that so far as rates are established, they must govern, and that all services for which rates are not provided, must be rewarded by special allowances. This interpretation may be specious; but in my opinion, it is not the true sense of the law. To give to this court power to act upon the same subject, by rule, and without rule, power to allow the same executor, a part of his compensation, according to a fixed rate; another part, according to a discretionary valuation of his services, would be, at least, a singular provision. The advantages of a fixed rate of allowance, are obvious. Such a rate has the effect of law; it is known and uniform; it governs all cases; and it renders litigation unnecessary. These benefits, the legislature intended to secure by the provision concerning a rate of allowance; but these objects would be frustrated, if every case were open to a claim for discretionary compensation. If a part of the reward of an executor is assessed by discretion, and another part is ascertained by a settled rule, there is little utility, in any rule concerning a part of his services; since the discretionary allowance for all other services, is not only subject to all the inconvenience of a special adjustment in each case; but will also in general produce as high a compensation to the executor for all his services, as if all had been measured merely by the merit of his particular case. This effect is exemplified in the present case. The defendant B. has charged and the Master has allowed a gross sum for all the services of B. as executor, in lieu of

the allowance made by the rule of the court under the statute. The services of this executor, like those of other executors, consisted partly in receipts and payments of money, and partly, in other acts, if the allowance for receiving and paying money, and the allowance for other services, had been given in separate statements, the aggregate of the two statements, would, I presume, have been the total sum which the Master has allowed. The rate of allowance established by the rule of the court; thus becomes almost useless, if the executor may claim compensation without regard to that rate; and it is equally so, whether his compensation is stated to be, as in this case, for all his services, and instead of that allowed by the rule, or is stated partly under the rule, and partly by some other mode of estimation. The provision that the rate of allowance settled by the Chancellor, shall be conformed to, in all cases of the settlement of such accounts, is a clear explanation of the meaning of the whole law. The Legislature here evidently mean, not to produce litigation, but to prevent it. They mean, that the settled rate of allowance, shall be a rule which shall prevail, not only in the court of Chancery, but also before surrogates, and in all other courts, in which such accounts may be settled; and above all, they mean that the rate of allowance, shall be a known rule, by which all parties may adjust such accounts, without resorting to any court to determine the amount of an uncertain claim for compensation. This great object of the law cannot be attained, if the compensation is not confined to allowances made by an established rate. If these plain provisions and these views of their meaning do not determine the true sense of this law, further illustration may be found, in more general views, in the nature of the subject, and in the operation of different plans proposed for making these compensations.

When it is proposed, that all services of guardians, executors, and administrators shall be compensated by one uniform rule, the objection made to this method, is, that it does not provide equitably, for different cases, and does not reach the exact justice of each case. This objection is answered by the statute itself, which does not promise or propose to attain the exact justice of each case, but proposes only, so much justice, as may be attained by a rate of compensation. But let the project of special rewards by a discretionary assessment in each case be considered, without reference to the statute, what is to be assessed? The value of the services of an executor, administrator, or guardian? The intrinsic or moral merit of such services, depends on an endless variety of circumstances, and also greatly, on opinion. The real labor of the trustee, is not easily ascertained, and when it is ascertained, is not easily valued. But in general, the personal labor of these trustees, is not great. In general vigilance and fidelity are the most important requisites; in these trusts sometimes, high talents and great zeal may be exerted, in the service of an estate or a ward, a guardian may be a parent to his ward in education, in kindness, in salutary counsel, and moral control; or while these duties are partially discharged or wholly neglected, he may pre-

serve the property of his ward, with entire fidelity ; each guardian, each executor, and each administrator, discharges his trust, with more or less assiduity, activity, and exertion on his own part, and with more or less benefit to those whose interests are committed to his charge. In any of these cases, how is the reasonable compensation to be ascertained ? Is the trustee to be paid for his services, without regard to their results ? or only, for those which have proved beneficial ? Is the reward to depend on service performed, or on benefits received ? or on the good motives which may have prompted fruitless labors ? Services performed by one trustee may be far more valuable than like services performed by another, if the respective services are measured by the rewards of industry, which the respective trustee might earn in their private pursuits.

The plan of indefinite and discretionary rewards must therefore be rejected, not only as inconsistent with the statute, but also as pregnant with mischiefs which render it wholly ineligible in itself, and the subject of compensation must be governed by some rule, which shall secure certainty while it affords justice. To avoid the objections made to a uniform rule, it has been proposed, to establish several rates of compensation, for different classes of service. The services of guardians, executors, and administrators, are various ; and it would be very difficult, if not impossible to classify all these services, into kinds or divisions, with any precision. If these services were distinguished into several kinds, the adjustment of a reasonable rate for each kind of service, would be a matter of great difficulty, and the general effects of many different rates, would be, to perplex the subject of compensation, with questions concerning the nature of the services performed, and to produce in most cases, an amount of compensation not more equitable, than one which might be derived from a single rate of allowance for the whole. The project of several rates of compensation, is also inconsistent with the statute itself, which authorizes an allowance, and a rate of allowance, for services, in terms sufficiently shewing that the legislature did not regard the subject of services, as divisible into portions, or susceptible of distinct rates of allowance. It has also been proposed to make the compensation depend upon time, by making an allowance for each day employed in the business of the trust. This would indeed be a universal rule embracing all services ; but the principle would be most pernicious ; no rule could be more dangerous, than that which should declare, that every guardian, executor, and administrator, shall receive a daily allowance for time employed in his trust ; much of the utility of these trusts, always consists in attention, superintendence, fidelity, and economy ; and cares and services like these, cannot be measured with any exactness, by days or months. The duties of these trusts, do not in general require entire days of attention, but they are usually performed, as occasion may require, with little or no interruption of the private pursuits of the trustee. The injustice of allowing daily wages ; the temptation to abuse which would be offered by such a rule ; and the difficulty of prevent-

ing abuses in its execution, are decisive objections to its adoption. If we regard the duration of these trusts, this fact affords no rule of compensation. One of these trusts, continuing five years, may be far more arduous, and may require much greater services, than another extending to fifteen years, for its entire execution. The idea of compensation measured merely by time, must therefore be rejected. Dismissing all schemes which are inconsistent with this law, and all others, which, if authorized under the power given to this court, are futile, impracticable or unjust, we must find, (what the statute authorizes and requires,) a reasonable principle of compensation for these services, such a principle to execute the intention of the law, must be one rate for all the services of all guardians, executors, and administrators, a uniform rule for all cases, without distinction between the different trusts, or different services of an executor, an administrator, or a guardian. These cases are susceptible of such a rule. The amount of property confided to an executor, administrator, or guardian, and passing through his hands, is a basis upon which his reward may be easily computed. The custody and care of the estate, are his duty; and his services in general bear a just proportion to the amount of the estate. Though the value of his services may not be in exact proportion to the value of the estate, yet in the general course of these affairs, the amount of the estate, indicates with sufficient exactness, the extent of his labors, cares, and services, and their reasonable value. Thus a plain rule of calculation is afforded by the amount of the property held in trust; a rule which is comprehensive as well as simple; and which in all ordinary cases, is a very just criterion of the reasonable value of the services of the trustee. This rule is recommended by its absolute certainty, its intrinsic propriety, its adoption in other states in which compensation is allowed to these trustees, its analogy to compensations made to other trustees and agents, who have the care of property, and by the justice which it will generally afford to an executor, administrator, or guardian. Whatever may be the weight of objections made to this principle, all other plans of compensation are exposed to far greater evils. If this method does not reach the abstract point of moral justice in each case, it is because human methods are imperfect, and here, as in so many other cases, we are obliged to abandon the vain search for a perfect method, and to be content with the general results of an absolute rule.

The trusts of an executor, administrator and guardian differ widely from all other trusts, and all other agencies. They are trusts for the dead; and they are also trusts for the living who are incompetent to act for themselves, or to watch over their own rights; each one of these trustees has great powers, and great latitude of discretion. He determines what shall be done, and he performs the service without direction from any constituent, and without the control and vigilance, which other principals hold over other agents. It is required by the most obvious policy, that these trusts should never become lucrative occupations.

A reasonable compensation governed by a fixed rule, may be demanded by justice, and seems to be the precise object of this law. But that every executor, administrator, and guardian, should be rewarded from the estate in his hands for all his services, whatever they may be ; and that his reward should be determined by the principles which would prevail between an ordinary factor, and his constituent, would be a most pernicious doctrine. If such a doctrine were law, then would these trusts become occupations inviting for gain, and mischiefs the most serious would ensue. There is no reason to believe that the legislature intended to adopt such a principle. If justice demands something, policy forbids much ; and the safe, as well as the obvious construction can be made by a fixed rule, so far only it shall be allowed. These trusts are always voluntarily assumed ; and no executor, administrator, or guardian can complain, that his compensation is inadequate, when he may accept the trust or not in his own pleasure, when he knows that his reward is limited, and when policy and morality forbid, that he should derive profit from such an employment. All proper expenses are always allowed to executors, administrators, and guardians when they act by others, for proper objects and in good faith, the compensations of agency and all just disbursements are allowed in their accounts, where the business of these trusts is difficult, much of it is usually done by the agency, or with the aid of others, and when just compensation is made to them, the estate indeed bears the expense, but it becomes a charge, in a way not liable to any dangerous abuse. By the allowance of just disbursements, the trustee has full indemnity against actual loss ; and by the additional allowance of a compensation so regulated, that it may be free from excess and abuse, all other claims of justice are satisfied. The principle which best reconciles policy with justice, and both with the provisions of this law, accordingly is, that the compensation for all the services of these trustees, shall be measured by the payments of the trustee, ascertained at the close of his trust. By this principle, the rewards of the trustee depend upon his payments ; so far as the trustee may feel the desire of gain, this principle is an incentive to fidelity prompting him, not only to collect and preserve the estate, but also to apply it faithfully, and to persevere in his duty, even to the last act.

It is only when the accounts of an executor, administrator, or guardian, are settled, that he can claim any compensation. Then the whole trust ceases, and if the trustee has faithfully paid, or is ready to pay all the monies which he has received, his fidelity and the measure of his reward, then appear ; with great reason therefore, the statute provides, that the rate of allowance shall prevail, and the allowance itself be made in the settlement of such accounts. The allowance settled by the late Chancellor, has been represented, as providing compensation for the receipt and payment of money, and for no other service, and it is then said, that

as the power of the court to make an allowance for other services, is unexecuted, such an allowance must now be made. .

The court has no power to make an allowance, without regard to a rate. It is empowered to act upon this subject, on petition or otherwise and the statute might be executed, either by an order in a particular case, or by a general order establishing a rate. If no rate were settled, the court might act in a particular case, by an order making an allowance, according to some rate which should be adopted ; and the effect of such an order would be, not only to make an allowance in the particular case, but also to settle a rate for other cases, as fully as if such rate had been adopted and declared, in any other form ; whether therefore a rate is established by a general order, or by an order made in a particular case, as the first instance of an allowance, it must be settled, with just regard to all the considerations which should have weight in the establishment of a regulation destined to govern all cases. If the existing rule compensates no service excepting receipts and payments of money, the court might settle a rate for other services, if it were at liberty to establish several rates for different services.

But the court has no power to establish more rates than one. If the existing rule is considered as making no allowance for many of the services of these trustees, it may be in that view, an imperfect execution of the statute ; but even in that view, as it is the only existing rate, it must govern all cases, until another rate shall be established. The rate settled for one service may be inadequate for the compensation of all services ; but while one rate is in force, no other rate can exist. The existing rule, interpreted with literal strictness, provides compensation for no service, excepting the receipt and payment of money ; but this is neither the spirit nor the effect of the regulation. The plan of the statute is compensation by the rate : and some principle of proportion must accordingly be found. The rule provides compensation for all the services of an executor, administrator, or guardian, by an allowance having proportion to the monies which he has received and paid. The monies received and paid, are made the basis of a calculation, to ascertain the value of all his services, and the result obtained by this calculation, is the reward, not only for receiving and paying money, but also for all other services in the trust. It is one reward for all services, and it is ascertained by a computation, founded on one species of service, which is described, not to reward that alone, but merely to give the principle of calculation. The principle of proportion which constitutes a rate, is found in one species of service, but the rate itself is, as by the statute it must be a rate of allowance for all services. The service selected as the basis of calculation is one, which in its nature embraces most of the other services of an executor, administrator or guardian. When an estate is committed to the care of an executor or administrator, the conversion of the whole estate, or parts of it, into

money, the collection of debts due to the estate, the payment of debts from the estate, the payment of legacies, or a residue of the estate, and the exertions made to effect these objects are in ordinary cases the most troublesome parts of his duty. Indeed his services usually consist entirely in these acts; a guardian receives the funds of his trust, and makes disbursements for his ward. When the executor, administrator or guardian closes his trust, by paying to those entitled the balance in his hands, his receipts and payments of money, are selected, as affording at once a convenient measure, and the best practical proof of the extent and value of all his services. The existing rule is thus considered, as affording direct compensation for all services which produce or terminate in the receipt and payment of money, and in a more general view, this rule may be regarded as affording compensation for all services whatever, by adopting and declaring the only principle of compensation, which is eligible and just, under this law. The question whether the existing rule provides compensation, for receiving and paying money as particular services, or for all services by an allowance computed upon receipts and payments must be decided, much more by the nature of the subject, and the real effect of the regulation, than by any criticism upon the terms of the rule. I regard the rule, as providing an allowance for all services, but if it provides only for the services of receiving and paying money, the question how other services are to be compensated, must be resolved by the principles already advanced. If the only sound and safe principle of compensation under this statute, is that which makes the allowance depend upon the payments of the trustee, and if the existing rule does not give compensation for all services, another rate and a further allowance might be necessary; but such rate and such allowance must still be determined by the same principle the payments of the trustee. Thus, a second rate and another allowance founded upon payments would result, and the real effect of considering the existing rate as providing compensation for no service excepting receipts and payments, is according to these views, to pronounce the existing rate too low and insufficient to produce compensation for all services.

I inquire not here, whether the rate of allowance which has been settled, is, or is not, the rate best adapted to produce a just amount of compensation to guardians, executors, and administrators, either for receipts and payments of money, or for all their services. This rate may be too high or too low, or it may be a reasonable rate for receiving and paying money, and insufficient to afford compensation for other services; or it may be sufficient for all services.

The rate intended by the statute should be such, as to produce, in its general operation a reasonable amount of compensation to guardians, executors, and administrators, as an average for their services. Whether the existing rate is regarded as a provision for all services, or as providing only for the receipt and payment of money; in either view, while

this rate and no other, is in force, this operates, as the only provision for all services. The adjustment of a reasonable rate is a subject not before me. The question here, is, whether any allowance can be made, without regard to a rate. My purpose has been to investigate the true sense of the statute, and I hold that this law does not authorize any allowance to guardians, executors, or administrators, in the settlement of their account, otherwise than in conformity to an established rate. In this case the Master having allowed for the services of the executor, a gross sum, not ascertained by any rate of allowance, the first exception to the report is allowed, and it is now referred to the Master, to take an account of the compensation to be allowed to B., by computing the allowance upon the monies received and paid by him as executor, according to the existing rule.

ADDENDA.

✓ Page 80. Note (a.)

THERE has been a floating opinion among the Profession in New York, that the case of Hart & Ten Eyck, as decided in the Court of Errors, had materially affected what seems to be, and Chancellor Kent has considered as, the English Rule upon this subject. The case has not been reported. The late distinguished Chief Justice (Spencer) has been kind enough to promise the Author a copy of his opinion, which, if it can be procured in time, will be inserted in an appendix. He has also informed me, that the point was before the Court of Errors at the last term, in a case which will be reported by Mr. Cowen, in his first volume.

From an examination of the Report of Hart and Ten Eyck, 2 Johnson, it would seem that the question must have come before the Court upon the following facts :—

The Bill was by an heir against an administrator for an account, alleging various acts of fraud and misconduct, and praying discovery and relief. The defendants set forth an account of their receipts, and of the monies paid by them. The Chancellor notices several charges in the account against the Estate, which he states are without proof, and therefore not to be upheld by the answer. As an example, he mentions an item.—“Paid J. W. Hat Manufactory, £119, 6s.” Such charges resting only on the answer, he rejects.

It would appear from this state of facts in that case, that the question upon which the Chancellor passed was this, whether upon a general Bill for an account against executors, or any other persons in the situation of trustees, the general requisition to set forth a full and true account of the estate come to their hands, and all amounts received or paid by them, shall be sufficient to make the allegation of payments by them, evidence. It is presumed that the bill in this case contained a clause of this import, and from the facts stated, the point could not have been stronger. It is scarcely to be supposed that the Court of Errors intended to declare, that this would be sufficient. And it is conceived that there will be found qualifications in the opinions delivered, which will contradict the conjectures of some of the profession respecting the case.

The writer has been favored with the brief of one of the eminent Counsel, (Mr. Emmet,) who argued the cause of *Hart v. Ten Eyck*, in the Court of Errors, on the part of the defendants. The whole scope of the argument of that gentleman, is to bring the case within the rule, that an answer responsive to a Bill, is to be taken as true, and not merely so, but must be disproved by two witnesses, or strong circumstances. His inge-

nuity is exercised to distinguish the cases upon this principle. Thus as to the case before Lord Cowper, cited by Chancellor Kent, he observes, "that from any thing in the Report, there is no room to conclude, that the relation about the £100, was at all responsive to the Bill, which related to the personal estate at the time of the death, and this was a gift during life."

Speaking of *Talbot v. Rutledge*, and *Howard v. Brown*, he says, "neither of these cases touch upon the point, whether the matter in the answer sought to be used was responsive to the bill, or not, and both may well apply to distinct allegations set up by the defendant, as matter of avoidance, without being an answer to the Bill."

The counsel relied much upon the case of *Sudgrove v. Bailey*, 3 Atk. 214, and from the facts, and the observations upon it, in *Blount v. Barrow*, 4 Br. C. C. 73. concluded that the answer had been replied to. The notice of that case in *Ward v. Turner*, 2 Vesey, Sen. 432. seem to shew this to be inaccurate. Counsel state that that case (*Sudgrove v. Bailey*.) rested singly on the averment in the answer, and Lord Hardwicke says, *that the manner of the gift was admitted*.

It is not disputed by the counsel, that a fact clearly and indisputably matter of avoidance, and not an answer to a charge and inquiry of the bill, must be proved by the defendant, if his answer is replied to.

On the other side it is clear, that if a distinct subject is alleged and inquired to by the plaintiff, he makes the defendant a witness to that, and must take his answer.

A case much relied upon in the argument was *Clason v. Morris*, 10 Johns. Rep. 524. That case well illustrates above position. Thompson, Just. after stating the rule, that an answer to a bill of discovery must be taken as true, unless disproved, observes, that in order to test the case before the court by that rule, it was necessary to look particularly at *the discovery sought* by the bill, and the answer given to it. The bill prays a discovery of what was due from S. to the Appellant, on what account, and how secured, and what property of S. had come to his hands in satisfaction of his demands, and under what agreement or understanding it was conveyed, assigned, or paid.

He then enters into an examination of the answer, and compares the facts stated with the inquiries of the bill. In respect to an agreement, he says—the answer as to the nature and terms of the agreement relative to the payment, and satisfaction of his demands is made evidence by the prayer, in the bill for a discovery as to that agreement. It was alleged certain property was taken in satisfaction. So again a denial of the reception of \$4000 in payment was made evidence by an express charge in the bill to that effect. Another example of this rule is the case of *Field v. Holland*, 6 Cranch 8. where the plaintiff averred that certain Judgments were satisfied, and expressly required the defendant to answer the

allegation. They could not then be allowed to say the answer was no testimony.

The Author has examined minutely the following cases, which are all he has found cited upon this general question, and in every one the decision has proceeded upon a distinct allegation in the Bill of a distinct substantive fact, and a requisition general or special to answer it.—*Pember v. Mathers*, 1 Br. C. R. 52. *Walter v. Hobbs*, 2 Atk. 19. *Cooke v. Clayworth*, 18 Vesey, 12. *Hine v. Dodd*, 2 Atk. 275. *Only v. Walker*, 3 Atk. 407. *Le Neve v. Le Neve*, 1 Vesey, Sen. 66. *Arnot v. Biscoe*, 1 Vesey Sen. 96. *Cooke v. Jackson*, 6 Vesey, 39. *East India Company v. Donald*, 9 Vesey, 275. *Fillings v. Armitage*, 12 Vesey, 78. *Wakelin v. Walthal*, 2 Chy. Ca. 8. *Smith v. Brush*, 1 John. C. R. 461. In each of these cases, the question has been upon the clear allegation of a substantive fact in the bill, met in the answer by an express and unequivocal denial.

But there is no trace of a decision *dictum*, nor even an allegation of Counsel, that a general requisition for a person in the situation of a trustee, to set forth his accounts, the disposition of the fund come to his hands, or his disbursements, makes a statement of his payments evidence. Indeed upon principle, this is not discovery in the light in which the rule in question has ever been applied. A matter of account is matter of relief. The form of the bill is a prayer for relief by setting forth a true and full account of the fund come to his hands and his disposition of it. Suppose the complainant requires him merely to set out an account of his receipts, or what composed the items of the estate, when he entered upon the execution of his trust. Can the defendant say, that this entitles him to make his account of payments evidence? If he cannot, then a most trivial variation of form, and omission of what can never be essential in a bill evades the rule. To be operative, indeed to be of any influence whatever, it must go that length; but to carry it that length would it is apprehended be a novelty in the doctrines of the court. It in truth amounts to this, that by the plaintiff requiring a statement as to one fact, the defendant's statements to every other fact are made testimony for him.

In cases against an executor who has filed an inventory, the rule in question, if it has been carried to the extent supposed, may be avoided by merely praying, that the defendant be decreed to account, as in *Misenor v. Burfort*, 1 Coxes cases. Then the decree would be merely that the Master take an account of all sums come to his hands, &c. and make him all just allowances, and before the Master he might be charged from the inventory.

The cases of *Boardman v. Jackson*, 2 Ball and Beatty, and *Robinson v. Scotney*, 19 Vesey, 582, are decisive upon this subject as to the rule in England. And those of *Beckwith v. Butler*, 1 Washington, 224, and *Paynes v. Coles*, 1 Mumford, 39, appear to declare the same rule in Virginia.

In the former the bill was filed against an executor, and prayed distribution of the personal estate.

The defendant stated in his answer, that there was little estate except a debt due by bond from T. which his Father gave him in his life time, as a compensation for his having consented to the sale of an English estate, which would have descended to him. The court said it would be monstrous indeed, if an executor when called upon to account, was permitted to swear himself into part of the testator's estate.

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of work July 2, 1884. J. H.

TABLE OF ERRATA.*

- Page 10 line 16 after word "cause" insert a period, and commence the word "when" with a capital.
- " " " 18 dele the period after word "made" and insert a semi-colon after word "nisi."
- " " " 20 between words "day" and "is," insert "and"—and after word "day" insert a comma.
- " 11 and Passim for "Elden" read "Eldon."
- " 17 line 16, Between words "directly" and "to" insert "contradictory."
- " 19 " 26 for "came" read "come."
- " " 27 for "particips" read "particeps."
- " 21 " 16 for "charging" read "changing."
- " 33 " 12 dele "u" in "refusal". Line 13 dele "the."
- " 49 " 36 for "opinion" read "option."
- " 56 " 11 for "supposing" read "suppressing."
- " 63 " 2 for "witnesses" read "witness."
- " 64 " 24 for "the" read "for."
- " 68 " 10 for "admits" read "omits."
- " 72 " 21 for "summoners" read "warrants."
- " 73 " 26 for "excepting" read "exceptions."
- " 82 " transpose the marginal references to Peyton v. Green to 7 line from bottom opposite words "This Court."
- " 96 " 18 for "charged" read "charge."
- " 109 " 11 from the bottom dele "true."
- " 113 " 13 for "reputed" read "reported."
- " 130 " 2 from bottom for "his" read "this."
- " 140 " 4 from bottom between "usufruct" and "all" insert "of."
- " 167 " 4 from bottom for "corrects" read "porrects."
- " 175 " 9 For "blandities" read "blanditiis."
- " " 13 For "morito" read "marito."
- " " 17 for "habucrite," read "habuerit."
- " " 19 for "divortu," read "divortil."
- " " 24 for "out" read "aut."
- " 188 " 10 for "simple" read "single."
- " 195 " 7 for "principal" read "principle."
- " 197 " 16 for "his" read "its."
- " 200 " 27 dele "than."
- " 202 " 27 for "on" read "or."
- " 209 " 15 for "in" read "is."
- " 218 " 1 for "mortgage" read "mortgagee."
- " 234 " 2 for "curio" read "curiae."
- " 247 " 5 for "mortgagee" (first in the line) read "mortgagor."
- " 257 " 4 from bottom for "on" read "or."
- " 260 " 7 from bottom between "may" and "in" insert "ask"
- " 261 " 3 between "leading" and "the" insert "to."
- " 269 " 12 after "estate" insert "defendant claimed title, and insisted" dele "and."
- " " 3 from bottom for "accepted" read "excepted."
- " 273 " 29 for "brought" read "bound."
- " 281 " 34 for "in 1782" read "prior thereto."
- " 286 " 15 Dele "no."
- " 301 " 13 for "disavering" read "discovering."
- " 322 " 27 for "this" read "thus."
- " 323 " 9 from bottom for "answer" read "Bill."
- " 334 " 19 for "impossible" read "possible."
- " 344 last line after "goods" insert "were."

* The publishers regret, that the errors in this work are so numerous. This may be attributed to its having been printed at a distance from the author's residence, and the proofs not having been revised by him. They suggest to the reader the propriety of correcting the work, by the table of errata.

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